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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-1410

JOEL EDELMAN, Director of Illinois Department of Public Aid, and Sucessor to EDWARD WEAVER, Former Director of Public Aid,

Petitioner,

—v.—

JOHN JORDAN, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF *AMICUS CURIAE* FOR NLSP CENTER ON SOCIAL WELFARE POLICY AND LAW, INC.

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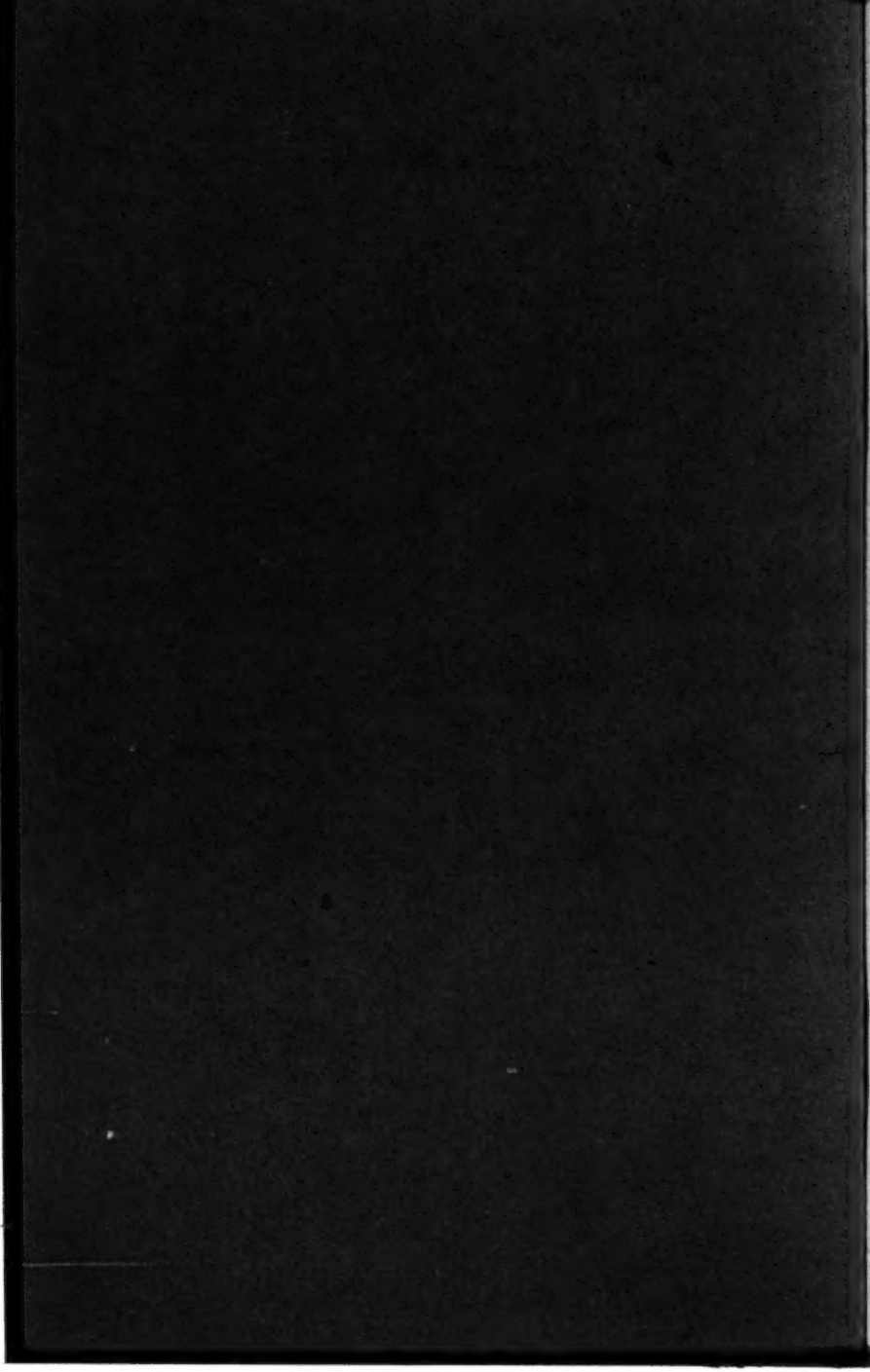

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MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND STATEMENT OF INTEREST OF *AMICUS CURIAE*

The NLSP Center on Social Welfare Policy and Law, Inc. respectfully moves the Court for permission to file the attached brief *amicus curiae.*

The NLSP Center on Social Welfare Policy and Law, Inc. is the specialized welfare law resource of the Legal Services Program of the Office of Economic Opportunity. The Center undertakes research pertaining to the legal rights of welfare beneficiaries and supports OEO-funded legal service programs through education and assistance in the preparation of important litigation. Since its inception in 1965 Center attorneys have represented parties, and the Center has participated as *amicus curiae,* in this Court

and the lower courts in cases involving all facets of welfare law. Specifically, the Center participated as *amicus* in this Court in *King* v. *Smith*, 392 U.S. 309 (1968); *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Wheeler* v. *Montgomery*, 397 U.S. 280 (1970); *Dandridge* v. *Williams*, 397 U.S. 471 (1970); and *Lewis* v. *Martin*, 397 U.S. 552 (1970), and Center attorneys represented welfare clients before the Court in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970); *Rosado* v. *Wyman*, 397 U.S. 397 (1970); and *Jefferson* v. *Hackney*, 406 U.S. 535 (1972).

The NLSP Center on Social Welfare Policy and Law, Inc. seeks leave to file this brief *amicus curiae* for the following reasons. The Center believes that a reversal by this Court of the decision below with respect to the award of benefits wrongfully withheld will substantially diminish the value to needy individuals of the right to enforce federal law against state officials confirmed by this Court in *Rosado* v. *Wyman, supra*. If retroactive benefits are barred, officials responding to political or other pressures can refuse to provide benefits mandated by Congress, certain that such benefits will never have to be paid in the future. Such a result, the Center believes, is repugnant to the principle of statutory entitlement established by this Court in *King* v. *Smith, supra, Townsend* v. *Swank, supra,* and *Carleson* v. *Remillard*, 406 U.S. 598 (1972), and the traditional equitable doctrines concerning restitution.

Amicus wishes to assure that this Court is presented with a discussion of the many factors which might affect the awarding of retroactive benefits in public assistance cases, including those which may differ from the instant case and may therefore not be presented by counsel for respondents. *Amicus* has unique familiarity with the many types of

cases concerning public assistance which come before the federal courts, and the variety of problems they pose. This brief is not addressed to the questions related to sovereign immunity which will no doubt be briefed by respondents, since resolution of those questions is not likely to turn upon the particular facts of this case.

Amicus requested consent for the filing of this brief from counsel for both parties by letters of August 24, 1973. Permission was received from counsel for respondents. Counsel for petitioners, however, failed to respond to our letter and subsequent telephone calls until October 17, 1973, at which time consent was denied.

WHEREFORE, movants pray that the attached brief *amicus curiae* be permitted to be filed with the Court.

Respectfully submitted,

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BRIEF *AMICUS CURIAE*

Summary of Argument

Pursuant to valid federal regulations, decisions on eligibility for public assistance benefits must be rendered within certain mandatory time standards. 45 C.F.R. §206.10. Where such decisions are not timely made a federal court may properly, pursuant to its inherent equitable jurisdiction, order the restitution of welfare benefits unlawfully withheld.

Thus all of the inherent equitable powers of the federal courts are, under prior decisions of this Court, available for the proper exercise of equity jurisdiction, unless otherwise clearly provided by statute. The reasons for this are

apparent from the nature of equity jurisdiction, which has always been to secure complete justice. In this case Congress has not limited this jurisdiction, and therefore such a remedy was available to the district court.

The exercise of equity jurisdiction is of course always within the sound discretion of the district court. Where, as here, however, that remedy restores persons to the situation they would have been in but for the violation in question, and furthers congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement." *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1947).

Restitution of public assistance benefits wrongfully withheld clearly restores injured recipients to the position they would have been in had the law not been violated. Similarly, restitution generally furthers the congressional purposes of deterring noncompliance with the Social Security Act, insuring the proper use of federal funds, and providing recipients with the statutory entitlement for which they have unquestioned need. Although each case must be considered on its own facts, restitution clearly furthers these objectives in this case, and therefore was properly ordered by the district court.

Statement of the Case

This case involves the rights of indigent aged, blind and disabled persons in the State of Illinois to receive desperately needed public assistance benefits "with reasonable promptness," as required by Title XVI of the Social Security Act, 42 U.S.C. §1382(a)(8).[1] Respondent John Jordan is a mentally retarded sixty-one-year-old male whose application for disability benefits was not acted on by the state welfare department for almost four months, despite the requirement of the federal regulation implementing §1382(a)(8), *supra*, that

> "[p]rompt action will be taken on each application, within reasonable State-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC [Aid to Families with Dependent Children], OAA, and AB, and as to aged and blind in AABD, and 60 days in APTD and as to disabled in AABD)." Federal Handbook of Public Assistance Administration, Pt. IV, §2200(b)(3).[2]

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[1] The category of assistance involved in this case is Aid to the Aged, Blind or Disabled (AABD), a combined program of assistance under which, pursuant to 42 U.S.C. §1381 *et seq.*, 19 states have elected to cover individuals who might otherwise be covered in separate programs of Aid to the Aged (OAA), 42 U.S.C. §301 *et seq.*, Aid to the Blind (AB), 42 U.S.C. §1201 *et seq.*, or Aid to the Permanently and Totally Disabled (APTD), 42 U.S.C. §1351 *et seq.* The particular statutory provision at issue here, 42 U.S.C. §1382(a)(8) provides that "[a] State plan for aid to the aged, blind, or disabled, or for aid to the aged, blind or disabled and medical assistance for the aged, must . . . provide that all individuals wishing to make application for aid or assistance under the plan shall have opportunity to do so, and that such aid or assistance shall be furnished with reasonable promptness to all eligible individuals."

[2] The above regulation was codified in the Code of Federal Regulations on February 27, 1971, after this case was filed. 45 C.F.R.

As is more fully set forth in the Brief for Respondents, Mr. Jordan filed this action on January 12, 1971, subsequent to a three-judge court ruling in *Rodriguez* v. *Swank*, 318 F. Supp. 289 (N.D. Ill. 1970), *aff'd*, 403 U.S. 901 (1971), which had held invalid Illinois' violation of the time standards set forth above in the Aid to Families with Dependent Children program. Mr. Jordan's complaint sought to enjoin Illinois' violation of federal requirements for the processing of AABD applications and to obtain restitution of all AABD benefits wrongfully withheld as a result of this violation. The district court granted summary judgment with respect to these claims, enjoined Illinois' noncompliance with the federal time standards for processing applications, and ordered the defendant to release all AABD benefits wrongfully withheld from those AABD applicants whose applications had not been processed in accordance with those time standards.[3] The Court of Appeals for the Seventh Circuit affirmed, *Jordan* v. *Weaver*, 472 F.2d 985 (7th Cir. 1973),[4] and this Court granted certiorari on June 11, 1973. 93 S. Ct. 2776 (1973).[5]

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§206.10(a)(3). Effective October 15, 1973, the federal time standards in AFDC, OAA, AB and as to the aged and blind in AABD are 45 days. 38 Fed. Reg. 22009 (Aug. 15, 1973).

[3] The period covered was from July 1, 1968, the effective date of the federal regulation, to April 16, 1971, the date on which the district court preliminarily enjoined the enforcement of the illegal state regulation. There is a typographical error in the judgment insofar as it reads April 16, 197"2".

[4] Other issues raised on cross-appeal were rejected by the Seventh Circuit. Those issues are not before this Court.

[5] On July 19, 1973, Mr. Justice Rehnquist denied petitioner's application for a stay with respect to the prospective relief but granted a stay of the provisions relating to restitution. Application A-51 (July 19, 1973).

The judgment of the Court of Appeals is in all aspects correct and must be affirmed. More particularly, it is the position of this *amicus* that the federal "reasonable promptness" regulations are valid, and that the restoration of benefits ordered by the district court is not barred by the Eleventh Amendment. These questions, however, are not addressed here. Rather their favorable resolution is, for purposes of this brief, assumed, leaving the question of the propriety of the award of retroactive benefits. This *amicus* asserts that such an award is an entirely proper exercise of equitable jurisdiction in this case, and in public assistance cases generally.

ARGUMENT

I.

The equitable remedy of restitution is properly employed to enjoin the wrongful withholding of public assistance benefits.

A. *Unless Otherwise Provided by Statute, All the Inherent Equitable Powers of the Federal Courts Are Available for the Proper and Complete Exercise of That Jurisdiction.*

The implication by the lower courts in this case of a remedy in the form of an award of retroactive benefits is entirely consistent with the equitable authority of federal courts generally to imply all appropriate remedies. Thus, as this Court's decisions in *Porter* v. *Warner Holding Co.*, 327 U.S. 395 (1947), and *Mitchell* v. *DeMario Jewelry, Inc.*, 361 U.S. 288 (1959), make clear, unless otherwise provided by statute, all of the inherent equitable powers of the federal courts are available for the proper and complete exer-

cise of equity jurisdiction, and federal courts may give whatever relief necessary under the circumstances:

> "The comprehensiveness of this equitable jurisdiction is not to be denied or limited in the absence of a clear and valid legislative command. Unless a statute in so many words, or by necessary and inescapable inference, restricts the court's jurisdiction in equity, the full scope of that jurisdiction is to be recognized and applied. 'The great principle of equity, securing complete justice, should not be yielded to light inferences, or doubtful construction.' *Brown* v. *Swann*, 10 Pet. 497." *Porter, supra*, at 398.

See also *Swann* v. *Charlotte Mecklenberg Board of Education*, 402 U.S. 1 (1971).

The reasons for this are apparent from the nature of equity jurisdiction, which has always been to secure complete justice. 1 Pomeroy's Equity Jurisprudence §§231, 236(a); *Porter* v. *Warner Holding Co., supra*, at 398. Courts may thus, pursuant to their general equity jurisdiction, not only order compliance with congressional acts in the future but may also compel by means of an order for restitution a return to the situation which would have existed had the congressional will not been violated. *Id.*, at 402; 4 Pomeroy's Equity Jurisprudence §1359. Without such power equity could not secure "complete rather than truncated justice." *Porter, supra*, at 398.

The purpose of the particular equitable remedy of restitution is to secure for the plaintiff that to which she or he is justly and in good conscience entitled, and to prevent the unjust enrichment of the defendant. Restatement of the Law, Restitution 1 (1937). Restitution is thus usually thought

of as a remedy by which the defendant is made "to disgorge ill-gotten gains or to restore the status quo, or to accomplish both objectives." 5 Moore's Federal Practice §38.24 (a) at p. 190.5. If the amount of the defendant's gain can be measured with some certainty or is easily ascertainable, recovery or repayment in restitution is proper. *Arkadelphia Milling Co.* v. *St. Louis Southwestern Ry. Co.*, 249 U.S. 134 (1918); 7 Moore's Federal Practice §65.10 at pp. 65-98. Restitution is thus traditionally employed to prevent the defendant from profiting from his or her illegal action at the expense of the injured party. As such it is "within the recognized power and within the highest tradition of a court of equity." *Porter* v. *Warner Holding Co., supra,* at 402.

Porter involved the power of a federal court to order restitution of rents collected by a landlord in excess of the maximums permissible under the Emergency Price Control Act. The lower court had held that there was no authority under the statute to order restitution. This Court reversed, enunciating the rule quoted above that *unless* contrary legislative intent could be demonstrated, all the inherent equitable powers of the district courts are available for the proper exercise of equity jurisdiction.[6] The Court thereafter specifically found the particular equitable remedy sought in that case—restitution of back rents—a proper exercise of equitable discretion under two theories—as necessary to restore ill-gotten gains (the traditional criterion for restitution) and as necessary to advance the statutory purpose of the Emergency Price Control Act:

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[6] Even a statutorily-authorized action for damages was found not to be intended by Congress "to whittle down" the court's equitable jurisdiction to order restitution. *Porter,* at 402.

"(1) It may be considered as an equitable adjunct to an injunction decree. Nothing is more clearly a part of the subject matter of a suit for an injunction than the recovery of that which has been illegally acquired and which has given rise to the necessity for injunctive relief. . . . [w]here as here, the equitable jurisdiction of the court has properly been invoked for injunctive purposes, the court has the power to decide all relevant matters in dispute and to award complete relief . . .

[and]

(2) It may be considered as an order appropriate and necessary to enforce compliance with the Act. . . . The inherent equitable jurisdiction which is thus called into play clearly authorizes a court, in its discretion, to decree restitution of excessive charges in order to give effect to the policy of Congress. And it is not unreasonable for a court to conclude that such a restitution order is appropriate and necessary to enforce compliance with the Act and to give effect to its purposes. Future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Id.*, at 399-400 (citations omitted).

See also *United States* v. *Moore*, 340 U.S. 616 (1951).

Mitchell v. *DeMario Jewelry, Inc.*, *supra*, made clear that *Porter* does not limit a court's authority to grant equitable restitution to situations where either express or implied congressional intent can be discerned. *Mitchell* involved a federal court's authority to order restitution of lost wages to employees discharged in violation of the Fair Labor

Standards Act. This Court reiterated the principles set forth in *Porter*, and held, despite statutory language which provided that no court should have jurisdiction to "order the payment to employees of unpaid minimum wages or unpaid overtime compensation," 29 U.S.C. §217, that Congress had not intended to limit the courts' traditional equitable powers. The legislative history of §217 was employed, as in *Porter*, merely to confirm that result. *Mitchell*, at 292. Restitution of lost pay was then held to be proper in order 1) to restore the employees to the condition they would have enjoyed had the employer not violated the Act, and 2) to effectuate the purposes of the Act by encouraging employees to report violations of the Act without risk of losing their entire pay during the period necessary to obtain reinstatement.

The thrust of these cases—and of the lower federal court cases which have ordered restitution of overcharges and/or wages which would have been paid but for the statutory violations in question, see, e.g., *Hodgson* v. *Taylor*, 439 F.2d 288 (8th Cir. 1971); *Schultz* v. *Mistletoe Express Service, Inc.*, 434 F.2d 1267 (10th Cir. 1970); *Wirtz* v. *Milton J. Wershow Co.*, 416 F.2d 1071 (9th Cir. 1969); *Shultz* v. *Parke*, 413 F.2d 1364 (5th Cir. 1969);[7] *Harkness* v. *Sweeney Independent School District*, 427 F.2d 319 (5th Cir. 1970), *cert. denied*, 400 U.S. 991 (1971); *McFerren* v. *County Board of Education of Fayette, Tennessee*, 455 F.2d 199 (6th Cir. 1972); *Smith* v. *Hampton Training School for Nurses*, 360 F.2d 577 (4th Cir. 1966);[8] *Robinson* v. *Lorillard*

[7] These four cases involve claims for back pay under the Fair Labor Standards Act.

[8] These three cases involve claims for back pay under 42 U.S.C. §1983.

Corporation, 444 F.2d 791 (4th Cir. 1971), *cert. denied*, 404 U.S. 1006 (1971); *Johnson* v. *Georgia Highway Express, Inc.*, 417 F.2d 1122 (5th Cir. 1969);[9] is that unless specifically precluded by statute, equitable restitution is within the power of the federal courts and is properly ordered to restore ill-gotten gains and advance the statutory purpose.

B. *Congress Has Expressed No Intent to Limit the Federal Courts' Inherent Equitable Powers to Order Restitution of Welfare Benefits Unlawfully Withheld.*

The authority of the federal courts to grant equitable restitution of public assistance benefits unlawfully withheld is squarely within the principles enunciated in *Porter* and *Mitchell*. There are no provisions of the Social Security Act which in any way restrict the courts' traditional equity powers to afford "complete rather than truncated justice." *Porter*, at 398. In the absence of any such limitation, the full scope of equity jurisdiction is to be recognized and applied.

The general topography of the federal categorical assistance programs is well known to this Court. See *King* v. *Smith*, 392 U.S. 309 (1968). In brief, those states wishing to take advantage of the substantial federal funds available under the various programs established by the Social Security Act must submit a "state plan" for each such program to the Secretary of Health, Education and Welfare for his approval. 42 U.S.C. §§1381, 1382, 1383, 1384.[10]

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[9] These two cases involve claims for back pay under Title VII of the Civil Rights Act of 1964.

[10] The citations are to Title XVI of the Act, the AABD program. Parallel provisions appear in each of the assistance titles.

The Secretary is under a statutory obligation to approve any such plan which at the time of its submission satisfies the requirements set forth in the applicable title of the Act. All fifty states and the District of Columbia, Guam, Puerto Rico and the Virgin Islands have submitted and had approved state plans under each of the Act's titles except for Nevada which has not submitted an APTD plan. Changes in state plans, which are frequently made, are submitted to HEW as plan amendments for a determination as to whether such plans, as amended, satisfy the requirements of the Act.

Upon the initial approval of each state plan, the Secretary of HEW must make quarterly certification to the Secretary of the Treasury for the payment of federal matching funds, on a formula basis, to each participating state, 42 U.S.C. §§1381, 1383,[11] and must continue such certification until he finds, after a hearing, that such state plan is no longer approvable, 42 U.S.C. §1384.[12] Judicial review of an HEW determination of nonapprovability is available in the United States Courts of Appeals. 42 U.S.C. §1316.

In *Rosado* v. *Wyman*, 397 U.S. 397 (1970), this Court "considered and rejected" the argument that the congressional grant of authority to HEW to cut off federal funds for noncompliance precludes injured public assistance applicants or recipients from suing state officials in federal court to redress violations of invalid state laws or regulations. 397 U.S. at 420. In so holding, the *Rosado* court noted that it was "most reluctant to assume Congress has closed the avenue of effective judicial review to those

[11] See footnote 10, *supra*.

[12] See footnote 10, *supra*.

individuals most directly affected by the administration of its program," *ibid.*, and concluded that there was "not the slightest indication that Congress meant to deprive federal courts of their traditional jurisdiction to hear and decide federal questions in this field."[13] Thus:

> "It is, of course, no part of the business of this Court to evaluate, apart from federal constitutional or statutory challenge, the merits or wisdom of any welfare programs, whether state or federal, in the large or in the particular. It is, on the other hand, peculiarly part of the duty of this tribunal, no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." *Id.*, at 422-423.

The *Rosado* court thus found nothing in the Social Security Act which would preclude the exercise of its "traditional jurisdiction." Under *Porter* and *Mitchell* therefore, all the inherent equitable powers of the federal courts were available. The remedy fashioned by the Court—an injunction against the payment of federal monies should the state not develop a conforming plan within a reasonable period of time—was one selected as particularly appropriate to the circumstances of that case. 397 U.S. at 421-422.

The only distinction between this case and *Rosado* is in the nature of the equitable relief sought. Here, as in *Rosado* (and many other welfare cases which have been

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[13] The Court also noted that it was, in this holding, adhering to its decision in *King* v. *Smith*, *supra*, "which implicitly rejected the argument that the statutory provisions for HEW review of plans should be read to curtail judicial review. . . ." *Ibid.*

before this Court), welfare beneficiaries are seeking declaratory and injunctive relief against the enforcement of an invalid state provision. In both circumstances federal funds are being received and used in a manner contrary to that intended by Congress. In both cases noncompliance with the federal statute or regulation relied upon results in channeling the matching federal grants in a way not intended by Congress. The only difference is that in this case the equitable remedy of restitution is also requested.[14]

Nearly one hundred lower federal courts have considered the issue of whether to order restitution of public assistance benefits unlawfully withheld. See, e.g., the cases discussed in *Alexander* v. *Weaver* (*Townsend* v. *Swank, supra,* on remand), 345 F. Supp. 666, 676-677 (N.D. Ill. 1972). Although only a few of the courts have discussed in any detail the nature of the jurisdiction they were exercising, see, e.g., *Alexander* v. *Weaver, supra,* and although a few have declined to exercise that jurisdiction, see, e.g., *Robinson* v. *Hackney,* 307 F. Supp. 1249 (S.D. Texas 1969), *appeal dismissed,* 397 U.S. 1082 (1970), not one of the courts has considered itself without the equitable *power* to order such relief.[15] The authority of the district court in a case such as this to award restitution has obviously

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[14] As presented to the Supreme Court, *Rosado* did not contain a prayer for retroactive payments. That relief was sought on remand, but held to be barred by the Supreme Court's mandate. 322 F. Supp. 1173 (E.D.N.Y. 1970). See further discussion at pp. 18-20, *infra.*

[15] This of course does not include those courts which have held their jurisdiction barred by the Eleventh Amendment, an issue beyond the scope of this brief. See, e.g., *Westberry* v. *Fisher,* 309 F. Supp. 12 (D. Me. 1970).

been viewed—by these courts—and quite correctly so as beyond question.[18]

Nothing in *Rosado* v. *Wyman, supra,* and on *remand,* 322 F. Supp. 1173, 1195-1196 (E.D.N.Y. 1970), is to the contrary, despite the conclusion drawn by one Circuit Court of Appeals. *Rothstein* v. *Wyman,* 467 F.2d 226, 232-233 (2d Cir. 1972). Thus, although the district court on remand in *Rosado* concluded that it was without power to grant equitable restitution, the basis for the court's conclusion was that such relief was barred by the precise mandate of this Court. 322 F. Supp. at 1196. Judge Weinstein thus reasoned that as this Court, in declaring New York's AFDC plan invalid under §402(a)(23) of the Social Security Act, had directed the district court to either approve the state's program (upon the state's submittal of a new AFDC plan) or restrain the further use of federal monies, 397 U.S. 397, 421-422, the court's power was limited to granting that relief.

There is, however, nothing in this Court's decision in *Rosado* to suggest that the lower federal courts are without equitable power to order restitution. First, the issue of

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[18] This Court has of course also affirmed several judgments awarding such relief. See, e.g., *Gaither* v. *Sterrett,* 346 F. Supp. 1055 (N.D. Ind. 1972), *aff'd,* —— U.S. —— (1973); *Carpenter* v. *Sterrett,* —— F. Supp. —— (N.D. Ind. 1972), *aff'd sub nom. Sterrett* v. *Mothers' and Children's Rights Organization,* 409 U.S. 809 (1972); *Zarate* v. *State Department of Health and Rehabilitative Services,* 347 F. Supp. 1004 (D. Fla. 1971), *aff'd* 407 U.S. 918 (1972); *Doe* v. *Swank,* 332 F. Supp. 61 (N.D. Ill. 1970), *aff'd* 404 U.S. 987 (1971); *Grubb* v. *Sterrett,* 315 F. Supp. 990 (N.D. Ind. 1970), *aff'd* 400 U.S. 922 (1971); *Rodriguez* v. *Swank, supra; Gaddis* v. *Wyman,* 304 F. Supp. 717 (S.D.N.Y. 1968) (order at ¶10,506, Transfer Binder, CCH Pov. Law Rptr.), *aff'd sub nom. Wyman* v. *Bowens,* 397 U.S. 49 (1969); and *Shapiro* v. *Thompson,* 270 F. Supp. 331 (D. Conn. 1967), *aff'd* 394 U.S. 618 (1969). These cases are discussed more fully in the Brief for Respondents.

restitution was neither briefed nor argued before any court in *Rosado* prior to the remand, nor could it properly have been, as the plaintiffs in that case had successfully enjoined the implementation of the New York budget cuts *before* their effective date, only to have that success reversed by the Court of Appeals. 414 F.2d 170 (2nd Cir. 1969). Thus this Court's opinion in *Rosado* did not consider the issue. Second, despite Judge Weinstein's reading of the *Rosado* mandate as being inconsistent with an award of benefits wrongfully withheld, there is nothing in the Court's decision that demonstrates any such inconsistency.

The purported "inconsistency" lay in the fact that had this Court viewed plaintiffs' right to benefits in accordance with §402(a)(23) to have "vested" it could not have ordered the relief it did in the case, namely, an injunction against further use of federal funds if New York failed to submit to the Court a lawful revised AFDC plan within a reasonable time. 322 F. Supp. at 1196. To the contrary, that particular equitable remedy was necessitated solely by the peculiar history of the *Rosado* case, which made any other prospective remedy impractical. The Court's construction of §402(a)(23) afforded New York various methods for complying therewith,[17] and so no other precise injunctive relief was available which could mandate a lawful program. But the difficulties in fashioning prospective injunctive relief had no bearing on the Court's power to fashion *other* equitable relief, i.e., restitution. Indeed, precisely because New York was to be given additional time to establish a lawful program while continuing to use

[17] E.g., New York could have restored special grants *in toto*, or it could have "averaged" them on a statistical basis, or it could have maintained some items and averaged the rest. As this Court noted, the illegal action was not "discreetly severable."

federal funds, restitution could well have been appropriate to redress the harms until such time as it did so.[18]

II.

Where, as in this case, equitable restitution of public assistance benefits wrongfully withheld restores the situation to that which would have been but for the statutory violation in question, and furthers the congressional purposes of the Social Security Act, there is little room for the exercise of discretion not to order such relief.

The exercise of equitable jurisdiction by a federal court is by its very nature within that court's sound discretion. As this Court has made clear, however, where the equitable remedy of restitution will restore the injured parties to the situation they would have been in but for the statutory violation in question, and otherwise further the congressional purposes, "there is doubtless little room for the exercise of discretion not to order reimbursement" *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 296.

In this case, and in virtually every instance in which welfare benefits are unlawfully withheld, an award of retroactive payments clearly restores the injured recipients

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[18] Congress has not only failed to restrict the federal courts' traditional equity power to grant restitution where violations of the Social Security Act have been adjudicated, it would appear that it has specifically authorized such relief. In 42 U.S.C. §1983 Congress provided that any person deprived "of any rights, privileges, or immunities secured by the Constitution and laws" may bring "an action at law, *suit in equity,* or other proper proceeding for redress" of such deprivation. Plaintiffs have been deprived of a valuable "right" granted by a federal "law" (§1382(a)(8) of the Social Security Act) and seek the equitable relief Congress intended the court to award.

to the position they would have been in had the state not violated the law. In Mr. Jordan's case, had his eligibility been determined promptly, he would have at the latest been authorized to receive AABD benefits on November 1, rather than on January 1, the day he actually began to receive assistance. In granting Mr. Jordan the benefits he would have received between these dates, the district court was therefore simply "ordering the return of that which rightfully belong[ed] to [him]." *Porter* v. *Warner Holding Co., supra,* at 402.[19]

The restitution of welfare benefits to the injured recipient also prevents the unjust enrichment of the defendant welfare department. In this instance, for every day in which the Illinois welfare department delayed in acting on Mr. Jordan's application, it was able to save that much in welfare benefits payable to him. As the Seventh Circuit noted, without the remedy of restoration of benefits

> "a state could engage in practices which would deny eligible recipients the full measure of that assistance which Congress has intended for them 'at the minimal risk of a subsequent finding of unconstitutionality [or illegality] (if indeed it is challenged) which finding would come only some time later after the case had gone the judicial route and which would deny retroactive relief thus giving the state the desired effect and savings at least during the period of [their] existence,'" citing *Alexander* v. *Weaver, supra. Jordan* v. *Weaver,* at 995.

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[19] The amount of Mr. Jordan's retroactive entitlement is $195.66. He seeks only the restoration of that amount.

See also *Board of Social Welfare* v. *Los Angeles Co.*, 28 Cal. 2d 90, 162 P. 2d 630 (1945), quoted at fn. 33, *infra.*

Restitution of public assistance benefits unlawfully withheld also furthers the intent of Congress. That intent is for states participating in the welfare programs under the Social Security Act to obey the paramount federal law, for federal funds to be properly spent, and, most importantly, for those eligible for assistance to actually be afforded their statutory entitlement.

The federal-state public assistance programs, of which the AABD program is one, reflect a scheme of "cooperative federalism." *King* v. *Smith, supra,* at 316. States which participate in the programs, however, must conform their state plans to the requirements of federal law. *Id.,* at 317. See also *Rosado* v. *Wyman, supra; Townsend* v. *Swank,* 404 U.S. 282 (1971); *Carleson* v. *Remillard,* 406 U.S. 598 (1972). Therefore in order to deter nonconformity, states which breach their obligations under the Social Security Act should be required to effectuate *nunc pro tunc* compliance by an award of retroactive benefits to those injured by their actions.

No other remedy can effectively deter states from violating the law. A cut-off of federal funds,[20] declaratory relief, or a prospective injunction of the violation operates only in the future. State officials may therefore until such time as any of these remedies is ordered violate the law, with everything to gain and nothing to lose by their actions.

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[20] As this Court is well aware, HEW has been "extremely reluctant to apply the drastic sanction of cutting off federal funds to states that are not complying with federal law." *Rosado* v. *Wyman, supra,* at 426 (Douglas, J., concurring).

Absent an award of retroactive benefits, they will suffer not at all for the period during which they avoid noncompliance, and therefore will be encouraged in—or at least not discouraged from—doing so. Such an award is therefore the only remedy which will ward off "the spectre of a state, perhaps calculatingly, defying federal law and thereby depriving welfare recipients of the financial assistance Congress thought it was giving them." *Jordan* v. *Weaver*, *supra*, at 995.[21]

The wilfulness of a particular state welfare official in wrongfully withholding benefits is not relevant.[22] Thus,

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[21] In a related case, involving the question of whether the Department of Agriculture or the states should be required to make restitution of food stamp benefits unlawfully withheld, *Butz* v. *Carter*, 479 F.2d 1084 (3rd Cir. 1973), the Solicitor General (arguing in favor of the liability of the states) has concluded similarly:

> "The [Food Stamp] Act expressly provides that participating States 'shall assume responsibility . . . for the issuance of coupons.' 7 U.S.C. 2019(b). That responsibility was voluntarily assumed. It was not exercised. In these circumstances, judicial relief against the State for the retroactive portion of unissued stamps may be implied, to enforce the State issuance responsibility expressly set forth in the Act and implementing instructions. No other practicable remedy to cure State laxity in the issuance process is available." * [The footnote (*) states: "A total cut-off of food stamps under 7 U.S.C. 2019(f) is not considered practicable, particularly from the beneficiaries' viewpoint."]. Petition for Certiorari, *Butz* v. *Carter*, No. —— (O.T. 1973), p. 12.

[22] The Second Circuit's decision in *Rothstein* v. *Wyman*, *supra*, found significant to its consideration of whether to order restitution in that case that in their view New York had not engaged in a wilful violation of the Social Security Act. It is unclear from the court's opinion whether it thought that only wilful violations of federal law should be deterred, see 467 F.2d, at 235, paragraph one, or simply that restitution should only be ordered for violations which were wilful. In either case, as developed *infra*, the court was incorrect.

there is a congressional interest in deterring *all* violations of federal law. Moreover, restitution has traditionally been ordered by courts without regard to whether the defendants' unlawful acts are the result of wilfulness or bad faith. The clearest examples are cases under the Fair Labor Standards Act in which employers have argued that their good faith belief that the employees in question were not covered by the Act should prevent an order for restitution of lost wages. As the Tenth Circuit stated in *Schultz* v. *Mistletoe Express Service, Inc., supra,* the equities are on the other side:

> "In essence Mistletoe says that it operated in the honest belief that its terminal operations were not within FLSA and that it is inequitable to penalize it now. We believe the equities run the other way. The belief may have been honest but, as we have pointed out, it was mistaken. Some of the Mistletoe employees are entitled to wages which they have not received. The equities lie with them. Mistletoe should not be enriched by the retention of money which it should have paid in wages." 434 F.2d 1267, 1272.

See also *Burk Builders, Inc.* v. *Wirtz,* 355 F.2d 451, 453 (5th Cir. 1970); *Shultz* v. *Parke, supra,* at 1370; *Wirtz* v. *Malthor, Inc.,* 391 F.2d 1, 3 (9th Cir. 1968).

In addition, wilfulness is of course always difficult to prove. This is particularly so in the welfare area where violations of federal law may be attributable, if not to wilfulness, then only to an incredible lack of concern for enforcement of the law. This must also be deterred.

Thus, for example, welfare recipients virtually always have great difficulty implementing the decisions of this Court, even where these decisions, though not technically

binding on those not parties to the litigation, are clearly applicable to a particular fact situation. New York, for example, as late as January of 1972, nearly three years after this Court's decision in *Shapiro* v. *Thompson, supra,* was forcing recipients to litigate the validity of a durational residency requirement. Although the three-judge court which then restrained New York's 1971-version of such a requirement did so from the bench after four minutes of deliberation in a one-sentence oral opinion, because the issue was so clear, see *The New York Times,* August 10, 1971, p. 1, recipients nonetheless were forced to go to court, indeed all the way to this Court, to obtain relief. *Lopez* v. *Wyman,* —— F. Supp. ——, No. 1971-308 (Aug. 9, 1971), *aff'd* 404 U.S. 1055 (1972). Moreover, between the statute's effective date, and the date of the court's earlier temporary restraining order of July 12, 1971, New York denied aid to persons who had not resided in the state for at least a year and accordingly reaped a financial, if not a legal, benefit from its actions. The "wilfulness" of such action, given the respective roles of the Governor, the legislature and the state welfare commissioner in carrying it out, would be difficult to prove. Cf. *Palmer* v. *Thompson,* 403 U.S. 217, 225 (1971). Their callous disregard for federal law, however, is clear, and should be deterred, as only an order for restitution can do.[23]

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[23] The plaintiffs in *Lopez,* for some reason, did not press any claim for restitution. Since that decision, however, New York has apparently still not conceded the issue. Thus, on April 25 of this year the New York Senate passed and sent to the Assembly a bill which would have barred public assistance to individuals who had not lived in the state for at least one year. *New York Times,* April 26, 1973, p. 49. Opponents of the bill charged its proponents with a move the latter knew to be unconstitutional, and the bill died in an Assembly committee. For related New York residency litigation after *Shapiro* (and prior to *Lopez*), see *Gaddis* v. *Wyman, supra.*

New York is of course not the only state in which litigation has been necessary to obtain compliance with *Shapiro* v. *Thompson*. See, e.g., *Rivera* v. *Dunn*, 329 F. Supp. 554 (D. Conn. 1971); *Barnett* v. *Lindsey*, 319 F. Supp. 610 (D. Utah 1970); *Baxter* v. *Birkins*, 311 F. Supp. 222 (D. Colo. 1970); *Morrison* v. *Vincent*, 300 F. Supp. 541 (S.D. W. Va. 1969). Moreover, one state's refusal to comply may be a catalyst to other states' noncompliance. Thus, the Connecticut statute struck down in *Rivera* v. *Dunn, supra*, that court noted, "followed the lead and essentially adopted the language of the New York legislature in attempting to justify the one year residency requirement." 329 F. Supp., at 558. Such unlawful action by states, even if not "wilful," must be deterred.[24]

In the case at bar, the district court found that Illinois knew it was violating the federal regulations in question. Illinois acknowledges this, but asserts that it had a right to litigate the validity of those regulations. Brief for Petitioner, p. 25, n. 9.[25] Of course, Illinois did have this right,

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[24] Unlawful non-compliance with this Court's statutory decisions is similarly common. Thus, numerous court decisions have also been necessary to obtain individual state compliance with the decision in *Lewis* v. *Martin*, 397 U.S. 552 (1970). See, e.g., *Ojeda* v. *Hackney*, 319 F. Supp. 149 (N.D. Tex. 1970), *aff'd*, 452 F.2d 947 (5th Cir. 1972); *Borkman* v. *Commissioner of Social Welfare*, 128 Vt. 561, 268 A.2d 790 (1970); *Boucher* v. *Minter*, 349 F. Supp. 1240 (D. Mass. 1972); *Grubb* v. *Sterrett, supra; Gaither* v. *Sterrett, supra*. Indeed, Indiana in the *Grubb* and *Gaither* cases appealed the issue to this Court twice, and lost twice.

[25] Illinois has, at best, raised the issue of the validity of the federal regulations very obliquely in this case. That validity was not one of the "questions presented" in the petition for certiorari, although it was briefed by lifting the arguments virtually word for word from the jurisdictional statement in *Rodriguez, supra*. Petition for Certiorari, pp. 23-28. The arguments in the petition for certiorari on this point are then "incorporated by reference" in petitioner's main brief. Brief for Petitioner, at 39.

although *amicus* would suggest that the equitable way to have raised its objections to the federal regulations was not to falsely promise to obey them as it did by accepting federal funds which were conditioned on such a promise, only to assert their invalidity three years later in a suit brought to enforce that promise, but to have directly challenged their validity in a promptly initiated suit against the federal agency. Moreover, once the federal regulations were upheld by this Court in *Rodriguez* v. *Swank, supra,* and the state regulations thereby struck, the asserted good faith of the defense in this case became questionable.[26]

In any event, as discussed above, whether technically "wilful" or not, Illinois should not be permitted to reap the financial benefits of its actions. Rather, "the equities run the other way." *Schultz* v. *Mistletoe Express Service, Inc., supra.* In short, "future compliance may be more definitely assured if one is compelled to restore one's illegal gains." *Porter* v. *Warner Holding Co., supra,* at 400.

A closely related congressional interest to that of fostering compliance with federal law is that of assuring that federal funds are properly spent. As this Court stated in *Rosado* v. *Wyman, supra,* it is particularly part of the duty of the federal courts "no less in the welfare field than in other areas of the law, to resolve disputes as to whether federal funds allocated to the States are being expended in consonance with the conditions that Congress has attached to their use." 397 U.S. at 423. For example, in this case,

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[26] Surely the fortuity of the *Rodriguez* class being defined narrowly to include only AFDC applicants does not bear upon the merits of the state's defense in this case in light of the fact that the state and federal regulations apply on equal terms to *all* federally-aided programs.

Illinois, by denying to welfare applicants their federal right to have their AABD applications acted on promptly, has clearly received federal money in violation of the congressional conditions attached to the receipt of that money. This is a misspending of federal funds which should not go unredressed, either prospectively or retrospectively. Equitable restitution of the welfare benefits unlawfully denied will therefore assure that federal monies allocated to the state are "expended in consonance with the conditions that Congress has attached to their use." *Ibid.*

The Illinois welfare director does not deny that restitution furthers the congressional purpose of assuring the proper use of federal funds, but rather argues that Congress has given no indication that is *necessary* to accomplish that purpose, since the only remedy "expressly contemplated" by the Social Security Act is a prospective cut-off of funds. Brief for Appellant, p. 25, citing *Rothstein* v. *Wyman, supra,* at 235.[27] However, as *amicus* has already demonstrated, *supra,* pp. 9-14, the exercise of equitable jurisdiction is not dependent upon the express language of an Act of Congress, or the necessary implication therefrom. *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 290. Rather if the exercise of that jurisdiction would further the congressional purpose, as both Illinois and the *Rothstein* court apparently do not dispute, its exercise is proper and may, indeed, if the congressional purpose would otherwise *not* be served, leave "little room for the exercise of discretion not to order reimbursement." *Id.,* at 296.

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[27] Both Illinois and *Rothstein* also consider this to be an interest "not personal to recipients." This Court in *Rosado,* however, in the context of deciding that recipients could sue states directly to redress violations of federal law (see pp. 15-17, *supra*), found this to be an important interest served by such a suit. 397 U.S. at 423.

The argument that although federal funds have concededly been misspent, an award of retroactive benefits is not justified because of the "significant increase in federal-state tensions which [results] from a court order requiring the state to expend its funds against its will," *Rothstein, supra,* at 235, is similarly flawed. First, a prospective injunction of course also increases "federal-state tensions" and requires the state to "expend funds against its will,"[28] yet the validity of that relief is unquestioned. Moreover, the money which the state is being required to expend on an award of retroactive benefits is money which the state was obligated to spend in the first instance, and would have spent but for the violation of federal law. As the Seventh Circuit stated in this case:

> "Since the State of Illinois obligated itself to follow federal law in disbursing welfare assistance, it cannot cogently complain that having to make those payments now, which federal law required it to make in the first place, will wreak fiscal disruption. In accepting the federal assistance program, the state must have calculated the cost of compliance." *Jordan* v. *Weaver, supra,* at 993.[29]

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[28] Indeed, in this case the cost of prospective compliance is greater than the cost of the retroactive relief sought. *Jordan* v. *Weaver, supra,* at 991.

[29] See also *Hodgson* v. *Taylor, supra,* at 290: "[t]he financial hardship caused by the order [an injunction prohibiting the employer from withholding unpaid back wages under the FLSA] is not a valid basis on which to deny the employees their remedy or to allow a wrong against the public to go uncorrected." Accord, *Shutz* v. *Mack Farland & Sons Roofing Co.,* 413 F.2d 1296, 1302 (5th Cir. 1969); *Wirtz* v. *Malthor, Inc., supra.* A court of equity might, however, ease the fiscal effect of an order of restitution by permitting the state welfare officer to pay the benefits in equal installments over a period of months rather than at one time in a lump sum.

A question separate and apart from that of fiscal cost, i.e., the cost attributable to the amount of the retroactive entitlement, is that of *administrative* cost, i.e., the cost of *making* the retroactive benefits. This latter cost is properly an equitable consideration. Some administrative cost is involved in virtually every award of retroactive welfare benefits. In most instances, however, it is substantially less than the amount of the benefits themselves and not much, if any, more than the amount of administrative cost which would have occurred had the benefits been paid at the time of the original entitlement to them. Moreover, even where the administrative cost is substantial, it should always be weighed against the relative importance of the benefits to the plaintiffs, see discussion pp. 36-45, *infra,* and thus will rarely be so great as to tip the equitable balance against an award of restitution.

A similar equitable consideration is that of the administrative burden or difficulty which may be involved in implementing an award of retroactive benefits. As with administrative cost, this is rarely a consideration which will outweigh the strong equities which otherwise militate in favor of an order of restitution. Moreover, a court of equity has various means of easing the administrative burden on the welfare department which are consistent with fully protecting the rights of individual recipients. Thus, for example, where plaintiffs have requested class relief,[30] a decree might be framed which would require notice by the welfare department to all members of the class of their entitlement to restitution, but require pay-

[30] The question of whether, in the first instance, to award class relief or relief for only the named plaintiffs would of course be governed by Rule 23.

ment only to those members who within a specified time period come forward to have the actual amount of their entitlement calculated. See, e.g., the orders in *Grubb* v. *Sterrett, supra; Gaddis* v. *Wyman, supra; Doe* v. *Swank, supra.*[21] Alternatively, the decree might require the amount of each individual's entitlement to restitution to be determined at a fair hearing. See, e.g., the order in *Solman* v. *Shapiro,* 300 F. Supp. 409 (D. Conn. 1969), *appeal dismissed,* 399 U.S. 488 (1970). Or the court might, because of a particular administrative difficulty in locating persons who were denied assistance many years prior to the institution of the lawsuit, choose a "cut-off" date, that is the date back to which restitution is to be made, which equitably addresses that problem.[22] See, e.g., the orders in *Machado* v. *Hackney,* 266 F. Supp. 644 (W. D. Tex. 1969) (date complaint filed); *Stoddard* v. *Fisher,* 330 F. Supp. 566 (D. Me. 1971) (date benefits denied). In short, each case must of course be decided on its own equities, but the district courts are not without power to fashion a remedy appropriate to any particular situation.

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[21] Of course in a situation where the class is composed of all welfare recipients in a certain category, such as a suit challenging payment differentials between various counties in a state (cf. *Rothstein* v. *Wyman, supra*), the class is so easily identifiable that a state might properly be required to simply institute an across-the-board increase within a certain time period, rather than notifying personally each member of the class and putting the burden on that individual to come forward. Alternatively, each individual's entitlement for retroactive benefits might be computed at the required redetermination of that individual's eligibility for assistance, and a check for that amount be disbursed at that time.

[22] For each individual the cut-off date is always the date on which the incorrect action in her or his case was taken, which, at the earliest, would be the effective date of the challenged statute or regulation.

The third and most important congressional policy furthered by an award of retroactive benefits is the "fundamental goal" of the Social Security Act—"the satisfaction of the ascertained needs of impoverished persons." *Rothstein* v. *Wyman, supra,* at 235. As this court has many times made clear, public assistance benefits are statutory entitlements, afforded as of right to those individuals eligible to receive them. *King* v. *Smith, supra; Goldberg* v. *Kelly,* 397 U.S. 254 (1970); *Townsend* v. *Swank, supra; Carleson* v. *Remillard, supra.* Thus in this case, when the state of Illinois determined that John Jordan was eligible to receive AABD benefits, it was not "volunteering" any funds or services as an act of mercy or aid to help Mr. Jordan, but rather was performing its statutory duty to aid all needy, disabled persons. Once Mr. Jordan's eligibility was determined, therefore, the state's commitment to provide him public assistance benefits "vest[ed] in and accru[ed] to" him, and if "not met due to an [illegal] withholding of benefits it must be made up to cover that period during which it was wrongfully denied." *Alexander* v. *Weaver, supra,* at 675.[33]

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[33] See also *Board of Social Welfare* v. *Los Angeles Co., supra*:

"It was the mandatory duty of the county to furnish aid according to the plan therefore which is laid down by the applicable provisions of the Welfare and Institutions Code [citations omitted]. *The obligation to pay became a debt due from the county to the applicant as of the date the latter was first entitled to receive the aid* [citations omitted]. The bare fact that an applicant has by one means or another managed to ward off starvation pending receipt of the payments to which he was previously entitled provides no sufficient excuse for a county to refuse to make such payments. To hold otherwise would, as suggested by the petitioner herein, provide a money saving device for the counties at the expense of most of our citizenship least able to bear the burden thereof." (Emphasis added.)

The substance of the statutory entitlement to public assistance is well revealed in the evolution of public aid programs from the pre-Depression pattern of relief. Thus prior to 1935, relief was administered as an act of charity, private and public, through thousands of poor relief agencies. Benefits were a discretionary "dole" dispensed in whatever amount and on whatever conditions a social worker saw fit to formulate. There was no attempt to define who was "eligible" or to give aid to more than a fraction of those similarly in need.[34] Aid was confined to the "worthy" poor and recipients were subjected to civil disabilities and severe behavioral restraints to keep them worthy.[35] Withdrawal of aid was as whimsical as its dispensation. Not surprisingly, a rule of law had no function in this system of relief; courts abstained on the ground that welfare was a gratuity or a privilege to be administered with complete discretion. See, e.g., *City of Albany* v. *McNamara*, 117 N.Y. 168, 174, 22 N.E. 931 (1889); *Wilkie* v. *O'Connor*, 261 App. Div. 373 (N.Y. 1941).

The Social Security Act of 1935, though reflecting a limited view of federal powers, cf., *Shapiro* v. *Thompson*, 394 U.S. 618 (1969); *Schechter Poultry Co.* v. *United States*, 295 U.S. 495 (1935), sharply departed from this pattern by establishing a "right" to public assistance benefits and requiring fair methods of administration respecting this right. Hence, the Act requires that the state agency provide an opportunity for a "fair hearing" to all aggrieved applicants and recipients, 42 U.S.C. §1382(a)(4); provide safeguards on the use or disclosure of information con-

[34] See Bell, *Aid to Dependent Children*, 11-19 (1965). See also Abbott, E., *Public Assistance*, 35 (1966).

[35] Abbott, G., *From Relief to Social Security*, 227 (1966).

cerning recipients, 42 U.S.C. §1382(a)(7); provide aid in the form of cash payments without restrictions on use, 42 U.S.C. §§1383, 1386; and provide a uniform program throughout the state under the administration or supervision of a single state agency. 42 U.S.C. §1382(a)(1) and (3).[36]

The concept of entitlement gave rise over the years to an expanding network of federal and state legislative controls on the conditions of eligibility for aid. As this Court recounted in *King* v. *Smith, supra,* this evolution confirmed the rejection of the pre-Depression standard of "worthiness" as the touchstone of aid. "Federal public welfare policy now rests on a basis considerably more sophisticated and enlightened than the 'worthy person' concept of earlier times." 392 U.S. at 324-25. All persons sufficiently disadvantaged to fall within the categories singled out for aid and who lack the resources and income deemed necessary for survival are, as a matter of statutory right, entitled to assistance. *Goldberg* v. *Kelly, supra,* at 262. In the words of the statutory command, "aid . . . ***shall*** be furnished with reasonable promptness to all eligible individuals." (Emphasis supplied.) 42 U.S.C. §§302(a)(8); 402(a)(10); 1202(a)(11); 1352(a)(10); 1382(a)(8). *King* v. *Smith, supra; Townsend* v. *Swank, supra; Charleson* v. *Remillard, supra.*

The federal regulations implementing the "reasonable promptness" provisions above recognize this statutory entitlement throughout. They speak of the individual's right to know about the public assistance programs, to apply for

[36] The citations are to Title XVI, the AABD program. Parallel provisions appear in each of the assistance titles.

them, to be informed about "rights and obligations" under the programs, and, if found to be eligible, to continue to receive payments until found to be ineligible. 45 C.F.R. §206.10. The particular regulation which is at issue in this case provides that a decision is to be made promptly, pursuant to state-established time standards not in excess of 30 or 60 days, depending on the category of assistance. Federal Handbook of Public Assistance Administration, Pt. IV, 2200(b)(3); 45 C.F.R. §206.10(a)(6)(i). Both the statute and regulations contemplate that where the state exceeds these time standards, restoration of benefits back to the thirtieth or sixtieth day is proper.[37]

Indeed, HEW regulations clearly require that where the wrongful action of a state welfare department is resolved in a fair hearing, or by the agency prior to the hearing, corrective payments *must* be made retroactively to the date of incorrect action. 45 C.F.R. §205.10(a)(13).[38] Thus in this case, if Mr. Jordan had been vindicated in a fair hearing rather than in a court proceeding, he would have received retroactive benefits pursuant to HEW's regulations.[39] The result should be no different simply because he elected to pursue his remedies in a federal court rather

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[37] New federal regulations, effective October 15, 1973, *require* payment no later than the 30th (60th in disability) day, although the time for determining eligibility in OAA, AB and as to the aged and blind in AABD has been extended to 45 days. See 45 C.F.R. §206.10(a)(6)(i), 38 Fed. Reg. 22009 (Aug. 15, 1973).

[38] New federal hearing regulations, effective October 15, 1973, renumber this section as 45 C.F.R. §205.10(a)(18).

[39] Federal matching is available both for such payments and for retroactive payments pursuant to a court order. Thus 45 C.F.R. §205.10(b)(2) provides:

"Federal financial participation is available for . . . (2) payments of assistance made to carry out hearing decisions, or to take corrective action after an appeal but prior to hearing, or to extend the benefit of a hearing decision or court order to

than in an administrative hearing.[40] This is particularly so in this case, since if Mr. Jordan and the other AABD applicants in Illinois had been included in the original class of AFDC recipients who sued the state in *Rodriguez* v. *Swank, supra,* to compel compliance with the same federal requirement at issue in this case, they would have received the restitution requested herein by virtue of this Court's summary affirmation of the district court's order requiring such relief in that case. Their entitlement to benefits—and equitable "right" to them—could therefore not be clearer.

The statutory entitlement is, of course, to have one's current and immediate needs met. It does not thereby follow, however, that "as time goes by . . . retroactive payments become compensatory rather than remedial." *Rothstein* v. *Wyman, supra,* at 235. Such a conclusion assumes that, once deprived of the subsistence benefit, a person no longer suffers the consequences of this deprivation. Such is simply not the case. Rather, the consequences of a deprivation of assistance are *continually* felt, and can begin to be undone only by an award of retroactive payments.

Thus, the categorical assistance programs are residual programs whose entitlements are the last resource for

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others in the same situation as those directly affected by the decision or order. Such payments may be retroactive in accordance with applicable Federal policies on corrective payments." [The numbering and language is the same in the version of the regulations effective October 15, 1973.]

See also *Memorandum for the United States as Amicus Curiae, Rodriguez* v. *Swank, supra,* No. 1269 (O.T. 1970), pp. 9-10, quoted in *Rothstein* v. *Wyman, supra,* at 240.

[40] This is of course particularly so in a federal action pursuant to 42 U.S.C. §1983, as under this statute one is not required to exhaust administrative remedies. *Damico* v. *California,* 389 U.S. 416 (1967); *Carter* v. *Stanton,* 405 U.S. 669 (1972).

individuals and families who have been found to be unable to support themselves or to qualify for other forms of public aid, and who have no other private source of support. To qualify and remain qualified for assistance in all states, individuals must have virtually no income and must report, and relinquish to the welfare agency or expend, virtually all resources, assets and property unrelated to their current basic needs.[41] "There is one overwhelming fact which controls here. By hypothesis, a welfare recipient is destitute, without funds or assets." *Kelly* v. *Wyman*, 294 F. Supp. 893, 899 (1968), *aff'd sub nom. Goldberg* v. *Kelly, supra.*

Income and resources limitations are of course not inconsistent with a program designed to meet the immediate needs of destitute individuals. Nor would they work any particular hardship if the public assistance grant adequately provided for those needs. Because the aid afforded is well below that which is minimally necessary for survival, however, and in some instances not even *intended* to meet in full the basic monthly needs of its beneficiaries, individuals and families in receipt of public assistance are engaged in a constant battle for survival in which they are nearly always on the losing side.

The gross inadequacy of the public assistance grant is well documented. The amounts provided by each state in

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[41] Under current federal regulations, the *maximum* cash reserve permitted for each recipient is $2,000, 45 C.F.R. §233.20(a)(3), but most states permit far less. For example, 43 jurisdictions permit no cash reserve to be retained in either AFDC or OAA. Public Assistance Report No. 50, Characteristics of State Public Assistance Plans under the Social Security Act (1971 Edition), Assistance Payments Administration, Social and Rehabilitation Service, United States Department of Health, Education and Welfare.

every category of assistance are substantially lower than the standards which have been determined by the United States Government to be minimally necessary for low-income individuals.

Thus as of July 1971 the largest monthly amount that could be paid for basic needs to a single OAA recipient ranged from a high of $250 a month ($3000 annually) in Alaska to a low of $75 a month ($900 annually) in Mississippi.[42] The median amount paid was $130 a month ($1560 annually). The State of Illinois pays $169. For an aged couple the largest monthly amount paid for basic needs ranged from $350 ($4200 annually) in Alaska to $121 ($1452 annually) in South Carolina. The median amount paid was $200 a month ($2400 annually). Illinois pays $211.[43] The largest monthly amounts paid AB and APTD recipients were similar. National Center for Social Statistics Report D-2, Program Statistics and Data Systems, Social and Rehabilitation Service, United States Department of Health, Education and Welfare, Tables 1 and 2 (July 1972) (hereinafter NCSS Report D-2).

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[42] As this Court is well aware, each federally-funded financial assistance program must establish a "standard of need", which represents the amount which the state has determined is necessary each month for an individual or family to purchase their basic subsistence needs. Cf. *Rosado* v. *Wyman, supra.* States need not pay eligible individuals the full amount of the standard, however, but may impose maximums on the amount of aid paid or pay only a percentage of need. *Dandridge* v. *Williams,* 397 U.S. 471 (1970), *Jefferson* v. *Hackney,* 406 U.S. 535 (1972). The amounts quoted here represent the amounts actually paid to individuals of families with no income, not the standards of need for such individuals.

[43] The largest monthly amount paid a single, aged individual in Puerto Rico for basic needs was $22 ($264 annually); for a couple, $35 ($420 annually). Puerto Rico and the Virgin Islands receive a reduced share of federal matching funds, and therefore have generally the lowest grants in all programs.

In the AFDC program the amounts are even lower. There the largest monthly amount paid to a family of four for basic needs in July 1971 ranged from a high of $375 a month ($4464 annually) in Alaska to a low of $60 a month ($720 annually) in Mississippi.[44] The median amount paid was $227 a month ($2724 annually). Illinois pays $217. NCSS Report D-2, Table 6.

When these amounts are compared with the amounts the United States Government has determined are minimally necessary for survival, the results are startling. Using just the family figures, which are the easiest to compare, the so-called federal "poverty line," developed in 1965 by the Social Security Administration and updated currently by the Bureau of the Census, defined the income level which separates the poor from the nonpoor as $4137 for a nonfarm family of four in 1971. Current Population Reports, U.S. Dept. of Commerce, Bureau of the Census, Series P-60, No. 82 (July 1972), Table 6, p. 7.[45] Only three states[46] had

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[44] Puerto Rico pays $53 a month, or $636 annually.

[45] The "poverty line" was originally arrived at in 1965 by taking the cost of the United States Department of Agriculture's "economy" food plan for a family of a given size, and adding two dollars for every dollar in the "economy" food plan for *all* other living expenses. Through both its choice of food plan and food/non-food ratio, the plan has been criticized even by its originator for its distortion of actual living costs. Orshansky, *Counting the Poor; Another Look at the Poverty Profile*, Social Security Bulletin, Vol. 28, No. 1 at p. 10 (January 1965). Thus it was based on a food plan designed for "temporary or emergency use when funds are low," *Id.*, at p. 6, rather than the slightly more generous U.S.D.A. "low-cost" food plan; and was based on a 1:4 1955-established ratio in spending costs although the Bureau of Labor Statistics had determined in 1961 that the food/non-food spending ratio was in fact 1:4. Since that time, the original SSA poverty definition has been modified by making "annual adjustments in the line to account for changing prices made to reflect changes in the Consumer Price Index rather than fluctuations in the per capita cost of food in-

AFDC grants above this level in July 1971; the highest amount paid a family of four in the remaining states ranged from $29 to $3501 *below* this figure. The median AFDC amount paid a family of four in 1971 was $2413 below $4137.

The Bureau of Labor Statistics has also calculated the minimal amount necessary for an urban family of four to live at a lower income level. In mid-1971 this amount was set at $7214 ($7536 for the Chicago area), $2750 more than the *highest* amount paid for AFDC in that year, and $4490 more than the median amount paid. "BLS Reports Rise in City Worker Family Budget in 1971," U.S. Dept. of Labor, Bureau of Labor Statistics, news release for April 27, 1973.[47] Clearly by either this standard, or the lower "pov-

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cluded in the economy food plan," although the impact of this revision on the data is termed "slight." Current Population Reports, U.S. Dept. of Commerce, Bureau of the Census, Series P-60, No. 67 (December 30, 1969), p. 3. Significant reason therefore remains to believe that poor families are not able to live in health and decency on the basis of income at the poverty line, particularly as the Department of Agriculture has estimated that only about one-fourth of the families who spend the amount allotted for food under the "low-cost" plan annually have a nutritionally adequate diet. Groom, *A New City Worker's Family Budget*, Monthly Labor Review, Vol. 90, No. 11, p. 6 (Nov. 1967).

[46] Alaska (see p. 39, *supra*), Michigan ($350 a month, or $4200 annually), and Massachusetts ($349 a month, or $4188 annually) are the states. NCSS Report D-2, Table 6.

[47] The BLS figures are an attempt to estimate actual costs, at current price levels, of purchasing the specified lists of goods and services drawn up. The lower level budget includes allowances for food (based on the Department of Agriculture's "low-cost" plan), housing, transportation, clothing and personal care, medical care and other items the family consumes directly including life insurance, occupational expenses, Social Security, personal income taxes, and personal items. As the BLS amount contains $609 for medical care, some of the cost of which may for welfare recipients be paid

erty line," the public assistance grants of all the states are wholly inadequate.

The actual structure of the public assistance grant similarly reveals how few of each individual's or family's current needs can actually be met—or, indeed, are even intended to be met—by that grant. Thus public assistance is provided on a monthly or semi-monthly basis with the intent of covering an individual's or family's basic needs—food, shelter and clothing—for the monthly or semi-monthly periods following its receipt. However, in all states certain items of need—for example, an occasional newspaper or magazine, school supplies, or such articles of clothing as a belt or suspenders—are simply not budgeted for at all, as it is assumed that these items are not "needed."[48] Thus, the recipient who reads a newspaper, because she considers herself part of the world despite her welfare status, or who buys a belt because he must keep his pants up somehow, will have to find the money for these

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by the Medical Assistance program, 42 U.S.C. §1396a, *et seq.*, and $1020 for taxes, the payment of which may be excluded as a work expense for some recipients, it may be legitimate to deduct these amounts in determining the needs of a public assistance family. Even after these amounts, totalling $1629, are deducted, however, the revised BLS standard of $5341 is well above the welfare levels in all of the states.

[48] The President's Commission on Income Maintenance, employing the 1968 "poverty line" figure of $3553 for an urban family of four, which is $729 higher than the median amount paid in *1971* for an AFDC family, similarly found that at the outset a poor family must do without many of the things that families with an average income consider to be "necessities"—"a car, an occasional dessert after meals, rugs, a bed for each family member, school supplies, or an occasional movie." *Poverty Amid Plenty, The American Paradox,* Report of the President's Commission on Income Maintenance, p. 15 (1969) (hereinafter *Poverty Amid Plenty*).

items at the expense of some state-designated essential item. Whatever the result, some current need must go unmet.[49]

A few states, in addition to the recurring grant for basic needs, provide for grants to meet certain "special" needs which are particular to the individual or family—for example, allowances for medically-required special diets, extra money for washing diapers, grants for a variety of major items of clothing or furniture, or money to cover fumigation or moving expenses. Unlike the items above, these items are conceded by the state to be "needed," but only by some individuals at certain times. Most states, however, including Illinois in AFDC for all but a few items, have abolished "special" grants in favor of a "flat" grant which reflects an averaging of the former amounts actually paid for special grants into one monthly or semi-monthly payment intended to cover all needs. Cf. *Rosado* v. *Wyman, supra,* 322 F. Supp. 1173 (E.D.N.Y. 1970), 437 F.2d 619 (2nd Cir. 1970), *aff'd* 402 U.S. 991 (1971). In these states, which are by far the majority,[50] welfare recipients are expected to "save" large portions of their basic recurring grants over a period of months or go deep into installment credit debt in order to purchase such items as a bed to sleep in,[51] a couch to sit on, or a coat to keep a child warm. For example, assume an aged individual or family in need

[49] "I have to cut corners and now I am cutting down the middle. I don't have any corners left to cut."—Witness before the Commission, St. Joseph, La. *Poverty Amid Plenty,* p. 17.

[50] HEW recommends that states adopt this budgetary method. See U.S. Department of Health, Education and Welfare, Bureau of Family Services, *Simplified Methods for Determining Needs* (edited by Gladys White, 1964).

[51] Thirty percent of families live in homes where each family member does not have a bed. *Poverty Amid Plenty, supra,* p. 15.

of $400 worth of major furniture and clothing, with a monthly recurring grant of $200. This immediate need must simply go unmet until a sufficient amount can be saved—which, even if the individual or family could manage to put aside as much as $20 a month, would take nearly *two* years! In such situations, the grant is not even *intended* to be able to cover concededly current needs.

Where a state's level of benefits is, on top of this, less than the full standard of need,[52] as it is in AFDC in 39 jurisdictions and in the adult welfare categories in 20 jurisdictions,[53] there is absolutely no way in which the grant can meet the recipient's current need. In these states money spent by the recipient on one-state designated essential item must always be at the expense of another state-designated essential item, as only a percentage of the state-determined amount needed to purchase such items is actually paid. A recipient who additionally wishes to purchase some item *not* included in the standard—the occasional newspaper above, or perhaps some toys for Christmas—or some item included but intended to be purchased only by monthly saving, such as a bed, could well spend virtually all of her or his monthly allowance for basic needs in a single day and unbalance the entire budget beyond repair.

In sum, the severity of the income and resources restrictions, the meagerness of the public assistance grant, and the omissions and understatements in that grant impose upon the welfare recipient a series of impossible choices, none of which can ever be exercised "successfully." The

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[52] See footnote 42, *supra*.

[53] See NCSS Report D-2, Table 6.

result is that welfare recipients, even when they are receiving the full amount of their entitled assistance, are always "behind." They always have no money for some items. They thus always have debts,[54] or are forced to save whatever they can each month (by cutting down on or doing without certain designated items in the standard[55]) so that at the end of several months they can perhaps purchase certain items.[56]

When, for some reason, the eligible recipient is wrongfully deprived of a payment for one or several months, she or he can probably never "catch up." The harms are inescapable, they occur at once, and they continue as intense in the early days as afterwards. For this reason, all that a retroactive payment of benefits does for the particular individual is to put her or him in the position she or he would have been in had the entitlement been correctly paid—that is, a lesser amount "behind." A payment of retroactive benefits is thus hardly a "windfall." Even if the recipient has managed to live through the period when the benefits should have been paid, this has obviously been done only by borrowing or living on credit, in which case there are debts to be paid, or by foregoing items of need, many of which may be just as sorely needed now (such as clothing), or perhaps even more sorely needed precisely

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[54] "We don't pay the full price for food. We get credit on food and pay once a month. But we don't pay all of it, we just pay a portion of it. [The grocer] carries [the rest] over to the next month."—Witness before the President's Commission on Income Maintenance, *Poverty Amid Plenty, supra*, at 16.

[55] "I either eat good and smell bad, or smell good and don't eat." *Ibid.*

[56] When another witness (before the President's Commission) was asked how he made ends meet, he replied, "They don't meet." *Ibid.*

because the individual did not receive a grant, although entitled to it (such as dietary supplements to make up for nutritional deficiency suffered during that period).[57] The consequences of a deprivation of assistance are thus *continually* felt and, contrary to the *Rothstein* court's assertion, 467 F.2d at 234, can begin to be "undone" *only* by an award of retroactive payments.[58]

The conclusion that with the passage of time retroactive payments become compensatory rather than remedial is also flawed insofar as it results from a failure to recognize that there will *always* be a lapse between "the last contested payment and the order of the district court," *Rothstein, supra,* at 235, simply because litigation takes time. Thus

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[57] Numerous similar ways of coping with inadequate incomes were documented in the President's Commission field research. One common method was simply not to pay a recurring expense such as rent or utilities. While this of course may result in eviction or a cut-off of services, it effects a saving for at least that month. "Borrowing" food or other items from friends and relatives was another common method, although rarely are such items able to be repaid. Reliance on credit was a third method. One witness told of disposing of possessions to meet current expenses: "We sold our home and sold everything we had. Had to. I always have to plan it out some way or find something around the place to sell or something." *Poverty Amid Plenty, supra,* at 16. The Commission concluded:

> "The poor inhabit a different world than the affluent primarily because they lack money. . . . They are generally unhappy with their circumstances and would like to be unpoor. Many Americans wonder why the poor do not escape from poverty. The answer to this question is clear to us: They usually cannot, because most are already doing as much as can reasonably be expected of them to change their conditions." *Id.,* at 21.

[58] The fact that HEW regulations require payment of retroactive benefits pursuant to a fair hearing, and that federal matching is available both for these payments and for payments pursuant to a court order, also confirms that such payments are a statutory entitlement for which eligible individuals have unquestioned need, regardless of how much time has passed since the benefits were withheld.

even if the plaintiffs, as here, 467 F.2d 985, 992, n. 11, file their lawsuit timely and pursue it vigorously,[59] the defendants may be dilatory in responding, the individual court which the action is before may take time to make its decision, or crowded court dockets may slow down the process.[60] Surely the plaintiffs should not, as the *Rothstein* court suggests, however, be penalized for delays which are so clearly beyond their control.[61]

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[59] Where the plaintiff delays in bringing the lawsuit, does not press the claim, or is otherwise dilatory, the equitable doctrine of laches may be a proper defense.

[60] "[I]n some areas of the country, most notably in our larger cities, the time between when a claim arises and when it is heard on the merits and decided is far too long. We recognize this [delay] as the foremost problem facing our profession today. . . ." PROCEEDINGS OF THE ATTORNEY GENERAL'S CONFERENCE ON COURT CONGESTION AND DELAY IN LITIGATION 138 (1956). See also Rosenberg, "Court Congestion: Status, Causes, and Proposed Remedies," The Courts, the Public and the Law Explosion 29-59 (1965), and *Jordan* v. *Weaver*, *supra*, at 992.

[61] The *Rothstein* court acknowledged that "there may perhaps be cases in which the *prompt* payment of funds wrongfully withheld" will serve the congressional purpose of satisfying the needs of impoverished persons, *ibid.*, but held that in that case, as over sixteen months had elapsed, the congressional purpose would not be served. The delay, however, was entirely attributable to the court process. Thus within a month of the effective date of the challenged statute a three-judge court had been convened and had stated its purpose to issue a preliminary injunction against the statute. The injunctive order, however, was not signed until over a month later, with an effective date of approximately a month beyond that time. The retroactivity sought was thus for the approximately three months between the effective date of the statute and the district court's preliminary injunction. The case was then appealed to this Court, which vacated and remanded the cause to the district court, whose final judgment was therefore not forthcoming until approximately a year after its original injunction. An order for restitution was submitted promptly, within a month, but the district court did not render its decision until over a year later, some sixteen months after its original preliminary injunction.

The question of the propriety in any particular case of an award of retroactive benefits to persons who are no longer receiving assistance is a separate one. Thus, although a court of equity might wish to consider whether restitution of benefits to persons no longer on the state welfare rolls furthers the congressional interest in meeting the ascertained needs of impoverished persons, this is not properly, in and of itself, cf. *Rothstein* v. *Wyman, supra,* at 234, a basis for denying restitution entirely. For one, an award to persons no longer on the rolls does restore an ill-gotten gain, and furthers the congressional interests in deterring noncompliance with federal law and assuring that federal funds are spent in compliance with that law. Moreover, the statutory entitlement to the benefits, whether one is still receiving them or not, is undisputed. Indeed, HEW regulations providing for retroactive payments following a fair hearing do not distinguish between persons currently on the rolls and persons no longer receiving assistance, 45 C.F.R. §205.10, and HEW will match court-ordered retroactive payments to persons no longer on the rolls. *Ibid.* See *Memorandum of the United States as Amicus Curiae, Alexander* v. *Weaver, supra.* The court which nonetheless finds this consideration overwhelming of course has the equitable alternative of denying relief to persons no longer on the rolls, rather than denying restitution to *all* persons affected by the illegality in question, as the *Rothstein* court incorrectly did.[82]

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[82] The question of whether an award of retroactive benefits might result in a decrease in the amount of money paid to persons currently on the rolls (*Rothstein*, at 234), is, we submit, *not* a relevant one. First, states may of course at any time reduce the amount of assistance paid. *Dandridge* v. *Williams, supra.* Thus, whenever welfare recipients determine to enforce any of their rights under law, if the vindication of those rights would in

In sum, each case must of course be considered on its own equities. This *amicus* brief has attempted to demonstrate, however, that equitable restitution of welfare benefits will always restore the plaintiffs to the situation they would have been in but for the statutory violation in question, and will generally advance the congressional purposes of assuring compliance with the Social Security Act, insuring the proper use of federal funds, and providing the plaintiffs with the statutory entitlement for which they have unquestioned need. Moreover, we have shown that in the particular case before this court such an award, as concluded by the district court and the court of appeals, will accomplish these objectives. There is accordingly "little room for the exercise of discretion not to order reimbursement," *Mitchell* v. *DeMario Jewelry, Inc., supra,* at 296, and the district court therefore quite properly awarded restitution to Mr. Jordan and the class he represents.

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any way cost the state money, the recipients run the risk that their lawsuit will be the "cause" of a corresponding decrease in payments to themselves and to other persons on the rolls, *whether or not* they request *retroactive* relief. Second, if such considerations influenced a federal court's decision to order either declaratory or prospective injunctive relief, that relief would rarely if ever be granted. For the same reason, they should not influence its decision to order retrospective equitable relief.

III.

CONCLUSION

For all the foregoing reasons, the judgment of the court of appeals must be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, etc.,

Petitioner,

—v.—

JOHN JORDAN, *et al.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

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IN THE

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OCTOBER TERM 1973

No. 72-1410

JOEL EDELMAN, etc.,

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—v.—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC.

Statement of Interest of the *Amicus Curiae*[1]

Amicus N.A.A.C.P. Legal Defense and Educational Fund, Inc., is a non-profit corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Negroes to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal services gratuitously to Negroes suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on

[1] Both the Petitioner and the Respondent have consented to the filing of this brief. Copies of their letters have been filed with the Clerk.

their own behalf. The charter has been approved by a New York Court, authorizing the organization to serve as a legal aid society. The N.A.A.C.P. Legal Defense and Educational Fund, Inc. (LDF) is independent of other organizations and is supported by contributions from the public. For many years its attorneys have represented parties before this Court and the lower courts, and it has participated as *amicus curiae* in this Court and other courts.

For many years LDF attorneys have represented plaintiffs in actions against state officials and state agencies seeking redress of violations of the Thirteenth, Fourteenth and Fifteenth Amendments. This litigation has challenged state discrimination in such disparate areas as education, public employment, voting, public assistance, public housing, and the administration of justice.

In the instant case the named plaintiff claimed the defendant had violated both the Fourteenth Amendment and a federal statute and regulation implementing that Amendment, and prevailed on the latter ground. The case thus requires the Court to consider the applicability of *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973) to state action violating the Fourteenth Amendment or implementing legislation.[2] The decision will necessarily have a substantial effect on the extent to which the prohibition against certain state action contained in the Thirteenth, Fourteenth and Fifteenth Amendments will remain enforceable in federal courts. Thus the Amicus has a vital interest in the present case, one beyond that of the immediate litigants, and therefore presents in the attached brief an alternative argument in support of the respondents' position.

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[2] See also *Krause* v. *Rhodes*, No. 72-1318; *Scheuer* v. *Rhodes*, No. 72-914.

Summary of Argument

This action arises under a federal statute and regulation which protect rights arising under the Fourteenth Amendment, particularly the guarantees of equal protection and due process of law.

This Court has long recognized that neither sovereign immunity nor the Eleventh Amendment should be allowed to prevent enforcement of the Reconstruction Amendments. The legal fiction of *Ex Parte Young*, 209 U.S. 123 (1908) was established to avoid a direct conflict between the Eleventh Amendment and the Thirteenth, Fourteenth and Fifteenth Amendments. When a conflict cannot be avoided in this manner the need to enforce the more recent and specific provisions of the Reconstruction Amendments must prevail over the Eleventh Amendment.

Sovereign immunity, as its eighteenth century and recent supporters conceded, is merely a procedural protection for the sovereign power of the states. It allows the states to conduct their affairs without threat of judicial interference. That immunity has no application, however, to state discrimination which violates the Reconstruction Amendments, for those Amendments stripped the states of their sovereign power to engage in such discrimination.

The primary justification for sovereign immunity and the Eleventh Amendment has traditionally been that the sovereign, state or federal, could be relied on to do justice to all claimants without judicial compunction. The Reconstruction Amendments, however, were founded on the premise that the states could not be trusted to respect and protect the basic rights of freedmen and others.

Hamilton and other federalists who supported passage of the Eleventh Amendment were concerned that Federal

judicial control over the states might lead to serious and even armed confrontation between the states and the federal government when enforcement was sought. But the Congress which framed the Reconstruction Amendments was not unwilling to resort to such drastic measures if necessary. When the Amendments were enacted the country had just ended a civil war over the principles contained therein, and federal troops were stationed throughout the south to protect freedmen and others. It is hardly likely that those who framed the Amendments had great compunctions about resort to measures which had troubled Hamilton and others seventy years earlier.

If the states could assert sovereign immunity or the Eleventh Amendment to bar effective relief, aggrieved citizens would have a right without a remedy. While such a situation may be appropriate under special circumstances, it is intolerable where the rights involved arise under the Reconstruction Amendments. Those Amendments were expressly regarded as remedial in nature; the men who framed them believed the rights described already existed under the Constitution, and were primarily concerned to provide a remedy where none had existed before.

The states may of course consent to be sued in federal court. When the Reconstruction Amendments were enacted every such creation of a federal right involved, under the decisions of this Court, *pro tanto* waiver of sovereign immunity because of the federal question provision of Article III. *Cohens* v. *Virginia*, 19 U.S. 264 (1821). Thus by ratifying the Reconstruction Amendments the states waived their Eleventh Amendment and sovereign immunity defense.

Throughout the last several decades states sued for violations of the Reconstruction Amendments, particularly the Fourteenth, have sought to defend their right to discriminate by claiming immunity from suit. This Court has

rejected such claims. *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). However, this Court's recent decision in *Employees* v. *Missouri Public Health Department*, 411 U.S. 279 (1973), has suggested that there may be some vitality in this defense to constitutional litigation. Sovereign immunity and the Eleventh Amendment have already been used to call into question the constitutionality of claims against a state for back pay under Title VII of the 1964 Civil Rights Act, and to insulate state officials from personal liability for willful discriminatory acts. A clear statement from this Court is needed that neither sovereign immunity nor the Eleventh Amendment may be asserted to prevent effective relief for violations of the Thirteenth, Fourteenth and Fifteenth Amendments.

Statement of the Case

This is an action challenging, as violative of both the Fourteenth Amendment and the applicable federal statute and regulations, Illinois' failure to process promptly certain applications for public assistance. The courts below resolved this question in favor of the plaintiffs on the ground that the state was not in compliance with those federal regulations, which require that eligibility determinations be made within thirty (30) days on applications for aid to the aged and blind and within sixty (60) days on applications for assistance to the disabled. See *Rosado* v. *Wyman*, 397 U.S. 397 (1970). It is however, clear that the federal statute[3] and regulation[4] involved in this case, serve to protect the constitutional rights to equal protec-

[3] 42 U.S.C. §1382(a)(8).

[4] 45 C.F.R. §106.10(3).

tion[5] and due process of law[6] guaranteed by the Fourteenth Amendment.

The question before the Court is whether, having concluded that Illinois had been administering public assistance in violation of the law, the federal courts have the power to order the Director of the Illinois Department of Public Aid to pay to past applicants out of public funds the benefits to which they would have been entitled had the state properly administered the law from its inception. The defendant claims that such an order, though on its face directed at him individually, would render this a case against the state of Illinois, which cases are barred by the Eleventh Amendment and the state's sovereign immunity. Plaintiffs urge and the Court of Appeals concluded that the disputed order was proper, both arguing that it fell within the power of the federal courts under *Ex Parte Young*, 209 U.S. 123 (1908), to rectify the conduct of state officials acting in violation of the Constitution or laws of the United States.

While agreeing with the position taken by the plaintiffs regarding *Ex Parte Young*, the Amicus would urge that the case be resolved in favor of the plaintiffs on another ground. Defendant maintains that the order requiring back

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[5] The state's failure to process all applications promptly yielded gross disparities in the actual grants received. *Jordan* v. *Weaver*, 472 F.2d 985, 998 (7th Cir. 1973). These unjustifiable variances raise serious questions of equal protection. See *Rothstein* v. *Wyman*, 303 F.Supp. 339 (S.D.N.Y. 1969), vacated on other grounds, 398 U.S. 275 (1970).

[6] The right to a prompt hearing and decision is an essential part of due process. Whether a decision denying, as opposed to terminating, welfare entitlements is a taking of property or even a deprivation of liberty, is a question of no small difficulty. See *Goldberg* v. *Kelly*, 397 U.S. 254, 262 n.8 (1970). This is, however, precisely the sort of question which Congress has authority, under section 5 of the Fourteenth Amendment, to resolve in favor of the individual. See *Katzenbach* v. *Morgan*, 384 U.S. 641 (1966).

payment of benefits, though nominally directed to a state official, is really an order against the state. There is no claim that the Director of the Department of Public Aid has sufficient personal funds to make these back payments; the only way in which adequate relief can be obtained is if the Director releases benefits wrongfully withheld at an earlier time. Thus if, as defendant asserts, the disputed order is improper, there would be no way in which a violation of the statute and regulation could be remedied.[7]

The Amicus maintains, for the reasons set out below, that neither sovereign immunity nor the Eleventh Amendment may be asserted to bar an effective remedy for a violation of the Thirteenth, Fourteenth and Fifteenth Amendments, or of legislation implementing those provisions. This being so, it is unnecessary to decide whether this case is, in effect, a suit against the state, for even if it were the state could not obstruct the granting of meaningful relief. Amicus suggests that it may be preferable to decide the case on this basis, rather than attempting an exposition of *Ex Parte Young* which might not be limited to litigation arising under the Reconstruction Amendments.

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[7] The United States Department of Health, Education and Welfare has taken the position that it lacks the power to compel the state to make such back payments.

ARGUMENT

I.

Neither the Eleventh Amendment nor sovereign immunity may be asserted to prevent effective relief for a violation of the Thirteenth, Fourteenth or Fifteenth Amendments.

A. The specific and more recent provisions of the Reconstruction Amendments must prevail over sovereign immunity and the earlier general language of the Eleventh Amendment.

The potential conflict between the Reconstruction Amendments on the one hand and the Eleventh Amendment on the other is apparent on the face of those provisions. While the Fourteenth and Fifteenth Amendments expressly, and the Thirteenth tacitly, create special rights in favor of private individuals and limit the power of the states, the Eleventh Amendment withdraws from the federal judicial power cases brought against one state by the citizen of another. Manifestly enforcement of those special rights against one state by the citizen of another would require precisely the remedy which the Eleventh Amendment appears to preclude. Similarly any doctrine of sovereign immunity, allowing the states to refuse to be sued by their own citizens, seems on its face inconsistent with the express grant of rights against the states to those citizens.

This Court has not heretofore been required to decide which principle should prevail if the only method of enforcing the post-Civil War Amendments is the type of action against the state usually precluded by sovereign immunity and the Eleventh Amendment. In *Ex Parte Young*, this Court expressly declined to decide whether the Fourteenth Amendment limited the effect of the Eleventh.

209 U.S. 123, 150 (1908).[8] Rather than reach that question, this Court has consistently sought to fashion remedies for violations of the Thirteenth, Fourteenth and Fifteenth Amendments which would not require transgressing the usual limitations on suits against the states. *Ex Parte Young* itself was the most important such remedy; while suits against state officers had, to a limited extent, been sanctioned before, *Young* worked a substantial expansion of that mode of relief. See *Jacobs, The Eleventh Amendment and Sovereign Immunity* 138-146 (1972).[9]

The policy considerations behind *Ex Parte Young* were expressly detailed in an opinion handed down the same day in *General Oil Company* v. *Crain*, 209 U.S. 211, 226-27 (1908):

> Necessarily, to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constitution, and may be forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much

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[8] "We think that, whatever the rights of complainants may be, they are largely founded upon that [Fourteenth] Amendment, but a decision in this case does not require an examination or decision of the question whether its adoption in any way altered or limited the effect of the earlier [Eleventh] Amendment."

[9] *Ex Parte Young* represented a substantial departure from the Court's earlier decisions in *Ex Parte Ayers*, 123 U.S. 443 (1887) and *Fitts* v. *McGhee*, 172 U.S. 516 (1899).

> of its operation. . . . The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. See *Ex Parte Young*, where this subject is fully discussed and the cases reviewed.

Young represented, at the time it was decided, "the culmination of the efforts by this Court to harmonize the principles of the Eleventh Amendment with the effective supremacy of rights and powers secured elsewhere in the Constitution." *Perez* v. *Ledesma*, 401 U.S. 82, 106 (1971) (Brennan, J. concurring and dissenting).

The Court's unwillingness to permit the Eleventh Amendment or sovereign immunity to preclude effective relief in cases such as this was further illustrated in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964). *Ex Parte Young* had stressed that the relief sought there was entirely preventative, and did not require "affirmative action of any nature." 209 U.S. at 159. Barely a year before *Griffin* this Court had reiterated, in two cases involving purely statutory causes of action, that a suit nominally against an officer was in fact a suit against the sovereign if affirmative action or the expenditure of public funds were the relief sought. *Dugan* v. *Rank*, 372 U.S. 609, 620 (1963); *Hawaii* v. *Gordon*, 373 U.S. 57, 58 (1963)[10] Since the relief sought in *Griffin* included reopening and funding the public schools of Prince Edward County, the defendants urged at length that the case was one against

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[10] Both *Dugan* and *Gordon* were actions involving the United States, to which the government objected on the grounds of sovereign immunity. *Dugan* questioned the statutory authority of the Secretary of the Interior to operate a particular water reclamation project. 372 U.S. at 615. *Gordon* involved the construction of a statute regarding the status of federally owned land in Hawaii. 373 U.S. at 57.

the state and thus barred by the Eleventh Amendment. 12 L.Ed. 2d 1106-1109; *Jacobs, The Eleventh Amendment and Sovereign Immunity*, 156-159 (1972). This Court, noting that the complaint alleged a violation of constitutional rights protected by the Fourteenth Amendment, summarily rejected this objection. 377 U.S. at 228.[11]

The considerations underlying *Young* and *Griffin* suggest that, while suits against a state should not be permitted when any other adequate remedy exists, if no such other relief is possible and such a choice cannot be avoided, vindication of the rights created by the Reconstruction Amendments must be given priority over the policies underlying the Eleventh Amendment and sovereign immunity. Such a case is very different from commonplace suits asserting essentially state law claims against the state, *Parden* v. *Terminal R.R. of Alabama Docks Dept.*, 377 U.S. 184, 187 n.3 (1964), or in which the federal question does not involve the vindication of constitutionally protected rights. See *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973). This conclusion is supported by the ordinary rule of construction stated by Mr. Justice Bradley in *The Virginia Coupon Cases*,

> If the Contract Clause and the Eleventh Amendment come into conflict, the latter has paramount force. It was adopted as an amendment to the Constitution, and operates as an amendment of every part of the Constitution to which it is at any time found to be repug-

[11] The Court's entire discussion of this matter was contained in but three sentences. "It is contended that the case is an action against the State, is forbidden by the Eleventh Amendment, and therefore should be dismissed. The complaint, however, charged that state and county officials were depriving petitioners of rights guaranteed by the Fourteenth Amendment. It has been settled law since *Ex Parte Young*, 209 U.S. 123 . . . (1908), that suits against state and county officials to enjoin them from invading constitutional rights are not forbidden by the Eleventh Amendment."

> nant . . . It is the last declared will of the law-maker, and has paramount force and effect. 114 U.S. 269, 331 (1885) (dissenting opinion).

In the instant case, of course, it is the Reconstruction Amendments which represent the last declared will of the law-maker. Moreover, while the Eleventh Amendment and sovereign immunity deal in a general fashion with all disputes between individuals and states, the Thirteenth, Fourteenth and Fifteenth Amendments deal more narrowly with the creation of certain specific rights. In the case of a conflict such as this the more specific provision usually controls. *Chicago, etc. R.R. Co.* v. *United Transportation Union*, 402 U.S. 570, 582 (1971).

B. Sovereign immunity has no application to activities which the Reconstruction Amendments placed outside the sovereign power of the States.

Sovereign immunity, the doctrine that a state cannot be sued without its consent, is but a procedural incident to sovereignty itself, the right and power of a state to conduct its affairs in whatever manner it sees fit and without outside limitations. Sovereign immunity serves to protect the state, particularly the executive branch, in the exercise of this power from control or regulation by the judiciary.

In the discussions of sovereign immunity at the end of the eighteenth century, particularly those leading to the embodiment of that immunity in the Eleventh Amendment, the question of whether and to what extent a state had sovereign immunity was understood to turn on whether and to what extent the state itself was sovereign. The most important judicial exposition of the case for sovereign immunity is Justice Iredell's historic dissent in *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419, 429 (1793). Justice Iredell

reasoned that the state had, subject to certain limitations, succeeded to the sovereignty of the King, and that the immunity from suit attendant to this sovereignty had not been waived or lifted by Article III of the Constitution:

> No other parts of the common law of England, it appears to me, can have any reference to this subject, but that part of it which prescribes remedies against the crown. Every state in the union in every instance where its sovereignty has not been delegated to the United States, I consider to be as completely sovereign, as the United States are in respect to the powers surrendered. The United States are sovereign as to all the powers of government actually surrendered. Each state in the union is sovereign as to all the powers reserved. It must necessarily be so, because the United States have no claim to any authority but such as the states have surrendered to them. Of course the part not surrendered must remain as it did before.

The other members of the Court, while concluding that Georgia could not claim immunity, agreed that procedural immunity and substantive sovereignty were inseparable.[12] Hamilton, in the oft quoted argument for immunity in *The Federalist*, was also of the view that immunity derived from, and could not be asserted in the absence of, state sovereignty:

> It is inherent in the nature of sovereignty, not to be amenable to the suit of an individual without its

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[12] Justice Blair concluded that the states had waived both sovereignty and immunity by ratifying Article III. 2 U.S. at 452. Justice Cushing believed that Article III had abridged the sovereignty of the states and with it their immunity. Id. at 468. Justice Wilson and Chief Justice Jay maintained the state had no immunity because the people, not the state, were the sovereign. Id. at 453-466, 469-479.

> consent. This is the general sense, and the general practice of mankind; and the exemption, as one of the attributes of sovereignty, is now enjoyed by the Government of every State in the Union. Unless therefore, there is a surrender of this immunity in the plan of the Convention, it will remain with the States, and the danger intimated must be merely ideal. The circumstances which are necessary to produce an alienation of State sovereignty, were discussed in considering the Article of taxation, and need not be repeated here. (Number 81).

The discussion of taxation, contained in *The Federalist* No. 31, dealt with the extent to which the states had surrendered their *power* to enact certain types of taxes.[13]

Justice Iredell rejected the suggestion that the states had never been sovereign or that that sovereignty had been waived by ratifying Article III of the Constitution creating federal jurisdiction over actions between a state and a citizen of another state. See *Jacobs, Sovereign Immunity and the Eleventh Amendment,* 64-74 (1972). But both Iredell and Hamilton conceded state sovereignty could be lost by a substantive constitutional limitation on the powers of the states and that, in such a case, immunity would fail as well.

At the time this was a theoretical concession of no practical consequence. The Constitution as it existed prior to the Civil War contained few significant limitations on the

[13] The same connection between the state's power and procedural immunity is reflected in the opinions in *Employees* v. *Missouri Public Health Dept.*, 411 U.S. 279 (1973). Justice Douglas' opinion equates lifting immunity with "lifting the sovereignty of the States." 411 U.S. at 287. Justice Marshall's opinion derives the principle of immunity from "the inherent nature of sovereignty," id., as does that of Justice Brennan, 411 U.S. at 317.

sovereignty of the states in dealing with individual citizens. The concept of federalism prevailing at that time left largely in the hands of the states decisions as to what basic rights, if any, individuals should have against state action, and how, if at all, those rights should be enforced. The national government assumed no substantial role under the Constitution in regulating the internal affairs of the states; such matters were conceived to properly be consigned to the exclusive jurisdiction of the states, and any federal interference would have transgressed the rights and reserved powers of the states. Disputes between states and individuals raising federal questions could reach the federal courts only under Section 25 of the Judiciary Act, providing for review in this Court. The few such cases which did reach this Court involved, not violations of federally protected rights, but state actions interfering with the conduct of the national government. See, e.g., *Osborn* v. *Bank of the United States*, 22 U.S. (9 Wheat.) 738 (1824); *Cohens* v. *Virginia*, 19 U.S. (6 Wheat.) 264 (1821). So long as the states' sovereignty in dealing with individual citizens remained intact, the immunity incident to that sovereignty was entirely appropriate.

In the decade following the Civil War this situation was deliberately and drastically altered by adoption of the Thirteenth, Fourteenth and Fifteenth Amendments, which expressly limited the power of the states in their relations with private citizens. Those enactments, together with the statutes enforcing them, created a panoply of federal rights designed to implement the new national commitment to racial justice. Congress clearly conceived that it was altering the relationship between the states and the nation, and working a "vast transformation" from the concepts of federalism that had prevailed in the late 18th century. *Mitchum* v. *Foster*, 407 U.S. 225, 242 (1972); *Zwickler* v.

Koota, 389 U.S. 241, 245-46 (1967). The effect of those Amendments was to overturn several of this Court's earlier decisions regarding the rights of individuals against the states and the ability of the national government to protect those rights. See *Barron* v. *Baltimore*, 32 U.S. (7 Pet.) 243 (1833); *Dred Scott* v. *Sandford*, 60 U.S. (19 How.) 393 (1857).

The changes wrought by the Reconstruction Amendments were understood to work a substantial restriction on the prior sovereignty and reserved rights of the states, and were opposed on just this ground. Congressman Edgerton, speaking against the Thirteenth Amendment, argued:

> Better, sir, for our country, better for man, that negro slavery exist a thousand years than that American white men lose their constitutional liberty in the extinction of the constitutional sovereignty of the Federal States of the Union. Cong. Globe, 39th Cong. 1st Sess. 2987.[14]

Congressman Rogers, opposing the 1866 Civil Rights Bill, the provisions of which were later codified in Section 1 of the Fourteenth Amendment, urged:

> I ask you to stand by the law of the country and to regulate these Federal and State systems upon the grand principles upon which they were intended to be regulated, that we may hand down to those who are to come after us this bright jewel of civil liberty unimpaired; and I say that the Congress or men who will strip the people of these rights will be handed down to perdition for allowing this bright and beautiful

[14] See also id. at 1366 (Remarks of Senator Saulsbury), 2939 (Remarks of Congressman Pruyn), 2941 (Remarks of Congressman Wood), 2943 (Remarks of Congressman Higby), 2962 (Remarks of Congressman Holman), 2994 (Remarks of Senator Pendleton).

heritage of civil liberty embodied in the powers and sovereign jurisdiction of the States to pass away from us. Cong. Globe, 39th Cong. 1st Sess. 1122-23.[15]

Congressman Shanklin protested that the Fourteenth Amendment struck down "the reserved rights of the states." Cong. Globe, 39th Cong. 1st Sess. 1865-66.[16] Such objections, however, were to no effect, for such a restriction on state power and sovereignty was precisely the goal of the proponents of these measures who believed that the rights of the states ought not include "the right to defeat the very object for which all government is made . . . to inflict wrongs on free citizens by a denial of the full protection of the laws." Cong. Globe, 42nd Cong. 1st Sess. 84-85 App. (Remarks of Congressman Bingham).[17]

The Reconstruction Amendments created precisely the circumstance in which Iredell and Hamilton had agreed

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[15] See also id. at 604 (Remarks of Senator Cowan), 1415 (Remarks of Senator Davis), 1174 (Remarks of Congressman Rogers), 1156 (Remarks of Congressman Thornton).

[16] See also id. at 2530 (Remarks of Congressman Randall), 2538 (Remarks of Congressman Rogers), 3147 (Remarks of Congressman Harding).

[17] "From the beginning, the program for the protection of men in their civil rights encountered the destruction of federalism argument. The Thirteenth Amendment, the first constitutional expression of that program, was proposed, encountered the federalism objection, and was adopted anyway. Next, the civil rights bill, designed to implement the Thirteenth Amendment, had heaped upon it the same charge. It was adopted notwithstanding. Then, at last, came the Fourteenth Amendment, created to accomplish what the Thirteenth Amendment had been designed to do but had failed to do because of the continuation of the federalism objection, intended to remove from the Civil Rights Act the constitutional doubts arising from the federalism objection to it, the Fourteenth Amendment was itself, in turn, subjected to the very same criticisms. Despite that criticism, it too was adopted." *ten Broek, Equal Under Law* 219-220 (1965).

immunity had no place, by stripping the states of their hitherto existing sovereign power to sanction slavery, deny equal protection or due process of the laws, or abridge the right to vote on account of race. In the limited areas prescribed by these Amendments the states have no authority the free exercise of which can be protected from litigation, and in such case the purpose underlying sovereign immunity and the Eleventh Amendment cannot be served.

C. The purposes of sovereign immunity and the Eleventh Amendment are inconsistent with the purposes of the Reconstruction Amendments.

While sovereign immunity was properly conceived as no more than an incident to sovereignty itself, the grant of immunity, particularly within a federal system, reflected a number of policies other than the mere protection of sovereignty itself. The policies which immunity would advance are, however, the very policies expressly rejected by Congress when it approved the Thirteenth, Fourteenth and Fifteenth Amendments.

1. *Reliance on state enforcement*

Advocates of sovereign immunity both before and after passage of the Eleventh Amendment urged that judicial jurisdiction over claims against a sovereign was unnecessary because the King, or the executive and legislative branches of a state government, could and would do justice in any case brought to their attention. In England, Iredell argued, while the resolution of such grievances was technically at the discretion of the crown, it was the King's practice, through the Chancellor, to do whatever justice required. "If any person has, in point of property, a just demand upon a King, he must petition him in his court of chancery, where his chancellor will administer right,

as a matter of grace, though not upon compulsion." *Chisholm* v. *Georgia,* 2 U.S. 419, 442 (1793). A citizen with a claim against a state, it was said, could rely on the legislature's good faith and sense of public duty. 2 U.S. at 445-6. Hamilton urged that contracts between a nation and an individual were binding, not in a court of law, but "on the conscience of the sovereign." *The Federalist,* No. 81. The argument was reiterated by Congressman Diven in 1862 urging retention of sovereign immunity by the federal government.

> Now, sir, what is the theory with regard to the satisfaction of claims against Governments? Why it is this: that Governments are always disposed to deal justly with their subjects; that Governments are never required or compelled by legal process to render justice to their subjects; and that they are always ready to do right when the right is ascertained; and the only object of a Court of Claims should be to aid the Government in determining what is right, and then the Government will do right always. That is the theory of government. It was a maxim of the common law that "the King can do no wrong," and it is the theory that Governments can do no wrong, that exempts them from this trial in courts to compel them to do right to their own citizens. It is false in theory to suppose that when an individual has a just claim against the Government it is necessary for him to sue the Government in a court of law to recover it. Cong. Globe, 38th Cong. 1st Sess. 1672.

This Court, in *Hans* v. *Louisiana,* 134 U.S. 1, (1890), reasoned that a state could be relied on to respect "the highest demands of natural and political law to preserve justice," and that the security for state loans "is the plighted faith of the State." 134 U.S. at 16, 21.

When the Reconstruction Amendments and legislation were proposed, opponents objected that such measures were unnecessary, and that reliance could be placed on the "honest purpose of the several States" to protect the rights of citizens. Cong. Globe, 39th Cong. 1st Sess. 1294 (Remarks of Congressman Wilson). The conclusion of the Congress and the nation, however, was to the contrary: in particular that the southern states could not be relied upon to respect and protect the rights of freedmen. Speaking in favor of the 1866 Civil Rights Bill, whose principles were soon incorporated in Section 1 of the Fourteenth Amendment, Representative Wilson explained:

> If the States would all observe the rights of our citizens, there would be no need for this bill . . . If they would recognize that "general citizenship" . . . which under this [privileges and immunities] clause entitles every citizen to security and protection of personal rights, . . . we might safely withhold action. And if above all, Mr. Speaker, the States should admit, and practice the admission, that a citizen does not surrender these rights because he may happen to be a citizen of the State which would deprive him of them, we might, without doing violence to the duty devolved upon us, leave the whole subject to the States. But, sir, the practice of the States leaves us no avenue of escape, and we must do our duty by supplying the protection which the States deny. Cong. Globe, 39th Cong. 1st Sess. 1117-18.

Congressman Cook argued

> Suppose . . . these States are restored to all the rights of sovereign States within this Union, and they carry out the same spirit they have already manifested toward these freedmen. . . . It is idle to say these men

> will be protected by the States. The sufficient and conclusive answer to that position I submit is, that those States have already passed laws which would now virtually reenslave them . . . Does any man in this House believe that these people can be safely left in these States without the aid of Federal legislation or military power? Does anyone believe that their freedom can be preserved without this aid? If any man does so believe, he is strangely blind to the enactments passed by legislatures touching those freed men. Id. at 1124-25.[18]

Six years of experience after the Civil War served only to confirm Congress' fears in this regard, and the 1871 Civil Rights Act, including the predecessor of Section 1983, was enacted "to afford a federal right in federal courts because, by reason of prejudice, passion, neglect, intolerance or otherwise, state laws might not be enforced and the claims of citizens to the enjoyment of rights, privileges, and immunities guaranteed by the Fourteenth Amendment might be denied by the state agencies." *Monroe* v. *Pape,* 365 U.S. 171, 179 (1961). The "plighted faith of the States" which this Court has found an adequate alternative to judicial enforcement of the contract clause in *Hans,* was expressly rejected as a sufficient guarantee of the rights of freedmen and others under the Reconstruction Amendments. Cong. Globe, 42nd Cong. 1st Sess. 85 (Remarks of Congressman Bingham).

The Congress which approved the Thirteenth, Fourteenth and Fifteenth Amendments, had only a few years earlier ended the sovereign immunity of the federal gov-

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[18] See also id. at 503 (Remarks of Senator Howard), 602 (Remarks of Senator Lane).

ernment. In his first State of the Union message, President Lincoln had urged abolition of that immunity:

> It is important that some more convenient means should be provided, if possible, for the adjustment of claims against the Government especially in view of their increased number by reason of the war. It is as much the duty of Government to render prompt justice against itself in favor of citizens as it is to administer the same between private individuals. The investigation and adjudication of claims in their nature belong to the judicial department.[19]

The debates on this proposal centered on whether or not the federal government was already providing a prompt and just resolution of claims against it, the procedure until that time being for Congress to enact a special appropriation in the amount it felt fair. Proponents of immunity urged such justice was already being done. See p. 19, supra. A majority of the Congress, however, concluded otherwise. Congressman Pendleton responded to the remarks of Congressman Diven quoted above,

> My colleague on the committee has told us today that, in theory, the Government is always willing to do justice to the citizen, that it is always willing to do that which equity and justice requires it to do. Now, sir, that is very good in theory, but it is very bad in practice, and when that gentleman has had experience in examining the claims brought against this Government year after year . . . he will find that there are innumerable claims on the calendar which have been examined and re-examined session after session . . . If the Government of the United States owes a debt to

[19] *Schlesinger and Israel, The State of the Union Messages of the Presidents*, v. 2, 1060 (1966).

> a citizen of the United States, why should that citizen be forced to come to Congress year after year, and spend his time and his money in besieging individual members, in order to show to them the justice of his claim, depending, in the end, even in the justest case, not upon its merits, but upon their patience to hear him fully, and their impartiality to judge fairly. Cong. Globe, 38th Cong. 1st Sess. 1675.

Congressman Bingham, the author of the Fourteenth Amendment, urged that the abolition of immunity would end the injustice of denying relief to citizens with legitimate grievances, and the corruption of the Congress by lobbyists pressing dubious claims. Id. at 1674. The statute conferring binding jurisdiction on the Court of Claims was enacted in 1863, 12 Stat. 765, and the remedies available to citizens broadened further in 1866. 14 Stat. 9.

The existence of a sovereign immunity defense in an action under the Reconstruction Amendments is manifestly incompatible with the purpose and background of those constitutional provisions. It cannot plausibly be urged that Congress first established a panoply of federal rights and remedies on the ground that the states *would not* voluntarily protect those rights, and yet intended to permit the states to avoid judicial enforcement of those rights on the grounds that the states *would* voluntarily protect such rights and that judicial enforcement was thus unnecessary. The same state legislature which enacted a discriminatory measure could hardly be expected, in response to the claims of its victims, to repeal that measure and appropriate funds to compensate them for any injuries suffered. Whatever support sovereign immunity may have commanded in the 1790's, by the 1860's Congress shared Lincoln's view that the courts were the most fair and efficient forum for resolving claims against the government.

2. *Problems of federal enforcement*

Federal jurisdiction over litigation against the states was opposed in the eighteenth century because of problems of enforcement which might arise. One of the great failings of the Articles of Confederation was that under it the national government could carry out its desires and policies only through the action and good will of the states. If a state was not amenable to this process, the two levels of government were necessarily arrayed directly against each other, at best resulting in a cumbersome process and at worst threatening more serious conflict. The federalists sought to give the national government power to carry out its policies directly, rather than relying on or resorting to action against the states. It was to avoid the need to coerce the states into compliance that the new constitution was designed. Under a continuation of a confederacy, Hamilton warned, resort to such a military coercion was inevitable.

> If there should not be a large army constantly at the disposal of the National Government, it would either not be able to employ force at all, or when this could be done, it would amount to a war between parts of the Confederacy, concerning the infractions of a league; in which the strongest combination would be most likely to prevail, whether it consisted of those who supported, or those who resisted, the general authority. It would rarely happen that the delinquency to be redressed would be confined to a single member; and if there were more than one, who had neglected their duty, similarity of the situation would induce them to unite for common defense. *The Federalist,* No. 16.

But, Hamilton pointed out,

> If the execution of the laws of the National Government should not require the intervention of the State

> Legislatures; if they were to pass into immediate operation upon the citizens themselves, the particular Governments could not interrupt their progress without an open and violent exertion of an unconstitutional power. *Id.*

Such affirmative efforts to obstruct enforcement of national laws were thought highly unlikely.

It was this same consideration which, for the federalists, militated against federal jurisdiction over the states. Hamilton himself pressed this argument in the oft quoted passage in *The Federalist* on the meaning of Article III of the proposed constitution:

> To what purpose would it be to authorize suits against the States for the debts they owe? How could recovery be enforced? It is evident, it could not be done, without waging war against the contracting State, and to ascribe to the Federal Courts, by mere implication, and in destruction of a pre-existing right of the State Governments, a power which would involve such a consequence, would be altogether forced and unwarrantable. *The Federalist,* No. 81.

The fear that such jurisdiction over the states might lead to the use of force was, at the time, not unwarranted. In the face of *Chisholm,* the Georgia House of Delegates passed a statute making any effort by a federal marshal to enforce a judgment for Chisholm a felony punishable by death without benefit of clergy. *Jacobs, The Eleventh Amendment and Sovereign Immunity,* 56-57 (1972). In another private action in 1809 seeking to collect funds held by the heirs of the state treasurer of Pennsylvania, decided *sub nom. United States* v. *Peters,* 9 U.S. (5 Cranch.) 115 (1809), the governor deployed the state militia around the

home of the heirs to prevent execution of the judgment. The United States marshal enlisted a posse, and an armed clash was averted only when the state relented in the face of direct threats by President Madison. *Jacobs, The Eleventh Amendment and Sovereign Immunity,* 77-80 (1972).

It cannot plausibly be maintained that those who framed the Reconstruction Amendments and civil rights legislation would have opposed suits against the states on the ground that force might be required to enforce the resulting court orders. Throughout the period when these measures were being enacted the armed forces of the federal government, with the enthusiastic support of Congress, were stationed throughout the former rebel states and were deeply involved in administering and policing those areas. See *Morrison, The Oxford History of the American People,* 717-725 (1965). After a four-year Civil War of unprecedented cost, the willingness of the national government to resort to force to preserve the fruits of its victory cannot be doubted. During the debates on the 1866 Civil Rights Bill, Congressman Thayer openly expressed this willingness:

> Why have laws if Government has not the physical force and strength to enforce them? Enforce them if you can through the forms of judical procedure and by the ordinary means at the command of judicial tribunals as this bill provides: but if there are combinations against the peaceful enforcement of these laws, why should not the military power of the United States, in pursuance of the express power given in the Constitution, come to the rescue of the civil power in order to enforce a law solemnly promulgated by the people of the United States? Cong. Globe, 39th Cong. 1st Sess. 1153.

Senator Pool expressed the same conviction six years later in support of the 1871 Civil Rights Act regarding the constitutional guarantee of equal rights:

> If the states shall fail to secure and enforce this right of the colored man, and deny to him protection in the free exercise of it as a citizen of the State, then the United States, by virtue of his national citizenship, must and will, by appropriate legislation, by all the power of its courts, by its land and naval forces, extend over him within the States the shield of the national authority. . . . I yet hope it is possible to escape more violent means by a prompt resort to the ordinary federal tribunals of justice. Unless that resort be promptly and efficiently taken, there is no hope of escaping for another year the application of the most stringent and ruinous military measures. Cong. Globe, 42nd Cong. 1st Sess. 609.

Both civil rights acts contained express provisions for resort to military rule if civil measures proved inadequate to protect the rights of the freedmen. See 14 Stat. 27; 17 Stat. 13.

To suggest that suits against the states under the Reconstruction Amendments should be forbidden to avoid problems of enforcement would be to ignore the fact that the congresses which framed those provisions were determined to use whatever measures were necessary to enforce the rights described therein. Nor are suits against state officers any less likely to incur virulent state opposition; the history of the last century, particularly since *Brown*, is studded with instances where extraordinary federal action was necessary to effectuate the decree of a federal court against such officers.

3. *Remedial purpose of the Reconstruction Amendments*

The defense of sovereign immunity, if allowed in all cases, would operate in some circumstances to deny citizens an effective judicial remedy to enforce their rights. Undoubtedly there are circumstances under which such a normally incongruous situation might be appropriate. Where control of state conduct is not a primary concern of the provisions establishing those rights, it may be that subjecting the states to judicial control is too drastic a method of achieving a largely incidental purpose. Where there is little reason to doubt the states will voluntarily comply with the federal requirements, Congress might conclude that harmonious federalism would best be served by trusting the states to act without threat of litigation. And where a fully effective means of enforcement less drastic than federal litigation is available, the necessity for such litigation might be doubted. See generally *Employees* v. *Department of Public Health and Welfare,* 411 U.S. 279 (1973).

None of these factors, however, are present here. Control of the states was not a merely incidental effect of the Reconstruction Amendments, it was the primary concern and goal. See *The Civil Rights Cases,* 109 U.S. 7 (1883). The Department of Health, Education and Welfare has taken the position that it lacks authority to compel payment of back benefits in a case such as this,[20] and enforcement of the Reconstruction Amendments has traditionally been left primarily in the hands of private litigants. See 42 U.S.C. §§1981-1983. Those amendments and the contemporaneous legislation were founded on the conviction that the states could not be relied on to voluntarily comply with the law. See pp. 18-23 supra. The men who framed

[20] Memorandum of Administrator, Social and Rehabilitation Service, dated April 1, 1971, pp. 1-2.

those Amendments were primarily concerned, not with preserving the delicate balance of harmonious federalism, but with assuring compliance by the recalcitrant states through whatever means necessary.

This Court has long recognized the particular undesirability of leaving those asserting constitutional rights without an effective remedy. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, wherever he receives an injury." *Marbury* v. *Madison*, 1 U.S. (Cranch) 137, 163 (1803), quoted in *Bivens* v. *Six Unknown Fed. Narcotics Agents*, 403 U.S. 338, 397 (1971).

> The Constitution of the United States, with the several amendments thereof, must be regarded as one instrument, all of whose provisions are to be deemed of equal validity. It would, indeed, be most unfortunate if the immunity of the individual states from suits by citizens of other states, provided or in the 11th Amendment, were to be interpreted as nullifying those other provisions which confer power on Congress to regulate commerce among the several states, which forbid the states from entering into any treaty, alliance, or confederation, from passing any bill of attainder, ex post facto law, of law impairing the obligation of contracts or, without the consent of Congress, from laying any duty of tonnage, entering into any agreement or compact with other states, or from engaging in war,—all of which provisions existed before the adoption of the 11th Amendment, which still exist, and which would be nullified and made of no effect if the judicial power of the United States could not be invoked to protect citizens affected by the passage of state laws disregarding those constitutional limitations. Much less can the 11th Amendment be

> successfully pleaded as an invincible barrier to judicial inquiry whether the salutary provisions of the 14th Amendment have been disregarded by state enactments. *Prout* v. *Starr,* 188 U.S. 537, 543 (1903).

See also *General Oil Co.* v. *Crane,* 209 U.S. 211, 226-27 (1908); *Osborn* v. *The Bank of the United States,* 22 U.S. (9 Wheat.) 739, 849 (1824); *Jacobs, The Eleventh Amendment and Sovereign Immunity* 144 (1972).

That any rights arising under the Reconstruction Amendments should be without a remedy is particularly inappropriate since these Amendments, especially the Fourteenth, were primarily remedial. The abolitionists who finally won control of the Congress and many states in the 1860's and 1870's had long maintained that the rights described in the Thirteenth, Fourteenth and Fifteenth Amendments already existed, though not recognized, by virtue of the privileges and immunities clause and the Bill of Rights. See generally *ten Broek, Equal Under Law* (1965); Graham, "The Early Anti-slavery Backgrounds of the Fourteenth Amendment" 1950 Wis. L. Rev. 479; Graham, "The 'Conspiracy Theory' of the Fourteenth Amendment," 47 Yale L.J. 371 (1938). Congressman Wilson, speaking in favor of the 1866 Civil Rights Bill explained:

> Mr. Speaker, I think I may safely affirm that this bill, so far as it declares the equality of all citizens in the enjoyment of civil rights and immunities, merely affirms existing law. We are following the Constitution. We are reducing to statute form the spirit of the Constitution. We are establishing no new right, declaring no new principle. It is not the object of this bill to establish new rights, but to protect and enforce those which already belong to every citizen. Cong. Globe, 39th Cong. 1st Sess. 1117.

Section 1 of the Fourteenth Amendment, according to Congressman Bingham who drafted it, was not to create new substantive rights at the expense of the states.

> [T]his amendment takes from no State any right that ever pertained to it. No State ever had the right, under forms of law or otherwise, to deny to any freed man the equal protection of the laws or to abridge the privileges or immunities of any citizen of the Republic, although many of them have assumed and exercised the power, and that without remedy. Id. at 2542.

The problem to which these Amendments and related legislation were addressed was the unenforceability of these rights. As Congressman Bingham detailed, in support of the 1871 Civil Rights Act,

> The States did deny to citizens the equal protection of the laws, they did deny the rights of citizens under the Constitution, and except to the extent of the express limitations upon the States, as I have shown, the *citizen had no remedy*. They denied trial by jury, and *he had no remedy*. They took property without compensation, and *he had no remedy*. They restricted the freedom of the press, and *he had no remedy*. They restricted the freedom of speech, and *he had no remedy*. They restricted the rights of conscience, and *he had no remedy*. They bought and sold men *who had no remedy*. Cong. Globe, 42nd Cong. 1st Sess. 85 App. (Emphasis added).

It was to create such a federal remedy for the aggrieved citizen—not for the Attorney General—that the Reconstruction Amendments, and Section 1983 in particular, were enacted. See *Monroe* v. *Pape*, 365 U.S. 167 (1961).

It would be particularly incongruous if the states were able to deny such a remedy by closing to such litigation,

by means of sovereign immunity or the Eleventh Amendment, both the federal and state courts. One of the discriminatory practices of particular concern to Congress after the Civil War was state legislation forbidding blacks to institute litigation or testify in state courts. *Monroe* v. *Pape*, 365 U.S. 167, 176-178 (1961); *ten Broek, Equal Under Law*, 187n, 191n, 192 (1965). This denial of justice was particularly opprobrious when the basic rights were involved. As Bingham urged even before the Civil War regarding the privileges and immunities clause,

> This guarantee of the Constitution of the United States is useless and a mockery, if it does not limit State sovereignty and restrain each and every state from closing its territory and its courts of justice against citizens of the United States. *ten Broek, Equal Under Law*. 333-34 (1965).

Proponents of the Amendments rejected the suggestion that, because of considerations of federalism, federal "courts must be closed to the appeal of our citizens." Cong. Globe, 39th Cong. 1st Sess. 1924 (Remarks of Congressman Shellabarger). That the states should be able to close the federal or state courts to civil rights litigation is particularly inappropriate since, in most cases, the states have long ago opened their courts to litigation against themselves arising out of loans or other commercial activities.

The manifest desire of Congress, in framing the Reconstruction Amendments and Section 1983, was to exercise all its power to create an effective remedy[21] and to withdraw from the states any power to defeat or prevent enforcement of certain basic rights. Congressman Bingham denied that the states had the right to deny constitutional rights

[21] Subject to certain express limitations not applicable here. See *Monroe* v. *Pape*, 365 U.S. 167 (1961).

"under any pretext whatever." Cong. Globe, 39th Cong. 1st Sess. 1088. Congressman Lawrence declared

> There are certain absolute rights which pertain to every citizen, which are inherent, and of which a state cannot constitutionally deprive him. But not only are those rights inherent and indestructible, but the *means* whereby they may be possessed and enjoyed are equally so. Id. at 1833 (Emphasis added).

The plethora of unprecedented legislation in the decade after the Civil War is ample evidence of the willingness of the Congress, in the words of one Senate critic, "to overturn the whole Constitution in order to get at a remedy for these people." Id. at 499 (Remarks of Senator Cowan). By the time Section 1983 was enacted, the dispute within Congress was no longer over what type of judicial remedy to afford. Liberals and conservatives agreed that vindication of constitutional rights should be sought first from the federal judiciary, where the complainant was to be afforded "all the power of its courts." See Cong. Globe, 42nd Cong. 1st Sess. 578 (Remarks of Senator Trumbull), 609 (Remarks of Senator Pool). The debate centered over what further remedies, such as martial law, Congress should provide if all the powers which could be conferred upon the courts were exhausted and found wanting. Congress can hardly have intended to deny the federal courts the authority, when needed, to entertain suits against the states, for such a limitation would have increased the need for resort to drastic extrajudicial measures which northerners and southerners alike wished to avoid.

Under these circumstances the existence of a sovereign immunity defense in litigation under the Reconstruction Amendments is entirely incompatible with the rights protected by those Amendments. The policies and assumptions

of fact which underlie sovereign immunity are precisely the policies and assumptions repeatedly rejected by Congress in the decade following the Civil War. The existence of such a defense will invariably lead to situations in which no remedy exists for a violation of the rights secured by the Thirteenth, Fourteenth and Fifteenth Amendments, a totally impermissible result since those Amendments and Section 1983 were enacted for the express purpose of assuring that persons whose rights were violated would no longer lack an effective remedy.

D. By ratifying the Reconstruction Amendments the States consented to be sued for violations thereof.

Inasmuch as the post-Civil War Amendments were, by their nature, inconsistent with the existence of a sovereign immunity defense, the states by ratifying those amendments waived their general right not to be sued by a private citizen. Even without this inconsistency the ratification of those amendments would entail the same waiver, because the new constitutional provisions established new enforceable federal rights.

The nature of any knowing intelligent waivers by the states during the ratification years, from 1865 to 1870, depends upon the understanding which existed at that time as to the consequences of enacting the three Amendments. The adoption of the Eleventh Amendment did not answer all the questions posed by *Chisholm* v. *Georgia*, 2 U.S. (2 Dall.) 419 (1793). In *Chisholm* three of the five members of the Court agreed that the states were generally protected by sovereign immunity, but Justices Cushing and Blair held the immunity had been waived by the provision in Article III establishing federal jurisdiction over suits between a state and a citizen of another state. See 2 U.S. at 452, 468. The Eleventh Amendment withdrew federal juris-

diction over such suits, but said nothing about the existence of sovereign immunity under other circumstances. Unresolved by that Amendment, in particular, was whether the states might also have waived their sovereign immunity by authorizing, elsewhere in Article III, federal jurisdiction over cases arising under the Constitution and laws of the United States.

That question received a definite answer in *Cohens* v. *Virginia,* 19 U.S. 264 (1821). In *Cohens* a criminal defendant sought to appeal from a state court to this Court on the ground that his conviction violated the constitution. The state of Virginia maintained that its sovereign immunity precluded such an appeal since it had not consented to the exercise of federal jurisdiction over itself. See 5 L.Ed. at 266-268. This Court, in an opinion written by Chief Justice Marshall, unanimously rejected the state's contention on the ground that, in ratifying Article III, Virginia had consented to federal jurisdiction over questions arising under the constitution and laws of the United States.[22]

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[22] "With the ample powers confided to this supreme government, for these interesting purposes, are connected many express and important limitations on the sovereignty of the states, which are made for the same purposes. The powers of the Union, on the great subjects of war, peace, and commerce, and on many others, are in themselves limitations of the sovereignty of the states; but in addition to these, the sovereignty of the states is surrendered in many instances where the surrender can only operate to the benefit of the people and where, perhaps no other power is conferred on Congress than a conservative power to maintain the principles established in the constitution. The maintenance of these principles in their purity, is certainly among the great duties of the government. One of the instruments by which this duty may be peaceably performed, is the judicial department. It is authorized to decide all cases of every description, arising under the constitution or laws of the United States. From this general grant of jurisdiction, no exception is made of those cases in which a state may be a party. When we consider the situation of the

See also *Rhode Island* v. *Massachusetts*, 37 U.S. (12 Peters) 657, 720 (1833).[23]

This conclusion in *Cohens* was recognized at the time as of great import to the vitality of sovereign immunity and the nature of federalism. In Virginia the legislature narrowly defeated a set of resolutions calling for constitutional amendments. *Jacobs, The Eleventh Amendment and Sovereign Immunity* 91 (1972). Both Thomas Jefferson and James Madison objected to the court's conclusion that a state might lack sovereign immunity in suits brought by its own citizens though such actions by citizen of other states were barred by the Eleventh Amendment. Id. at 92. Despite these criticisms, no constitutional amendments were seriously considered, and *Cohens* remained the law, unmodified, from Chief Justice Marshall's decision in 1821 until at least 1890.[24]

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government of the Union and of a state, in relation to each other; the nature of our Constitution; the subordination of the state governments to that constitution; the great purpose for which jurisdiction over all cases arising under the constitution and laws of the United States is confided to the judicial department, are we at liberty to insert in this general grant, an exception of those cases in which a state may be a party? Will the spirit of the constitution justify this attempt to control its words? We think it will not. We think a case arising under the constitution or laws of the United States, is cognizable in the courts of the Union, whoever may be the parties to that case." 2 U.S. at 393-394.

[23] Although under *Cohens* the judicial power extended to Federal question litigation against the states, it was not until 1875 that Congress conferred *nisi prius* jurisdiction over such cases on the Federal courts. See 28 U.S.C. §1331.

[24] In 1890 the Court, after considering *Cohens*, refused to apply Chief Justice Marshall's conclusions to an action to collect a debt owed by Louisiana on the ostensible ground that the state had impaired the obligation of contracts. *Hans* v. *Louisiana*, 134 U.S. 1, 18-21 (1890). With regard to constitutional provisions which are not self-executing, this Court has recently concluded that a state's waiver merely confers on Congress the power to subject the

The legislators who enacted the post-Civil War Amendments and civil rights legislation were well aware of *Cohens*, as might be expected. Congressman Bingham, the author of the first section of the Fourteenth Amendment, cited *Cohens* as proof of the federal power to protect indivdual rights against claims that this would infringe state sovereignty. Cong. Globe, 42nd Cong. 1st Sess. 81-82 App. Opponents of this legislation made reference to Justice Marshall's statement that the states were sovereign, urging that such sovereignty was inconsistent with the proposed federal role in protecting freedmen and others. See e.g. Cong. Globe, 39th Cong. 1st Sess. 1156 (Remarks of Congressman Miller). In the face of *Cohens*, such opponents conceded that even the contract clause was enforceable against the states. Cong. Globe, 42nd Cong. 1st Sess. 577 (Remarks of Senator Trumbull). Indeed, this Court in *The Civil Rights Cases* seemed to have believed that federal question jurisdiction included jurisdiction to hear actions against a state to enforce the contract clause. 109 U.S. 7, 12 (1883).[25]

There can be no doubt that the states understood that, under *Cohens*, every creation of a new federal constitu-

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state to federal jurisdiction, and separate inquiry must be made in each case as to whether Congress elected to exercise the power conferred on it by the states. *Employees* v. *Missouri Public Health Department*, 411 U.S. 279, 286-7 (1973). The continued vitality of *Cohens* in the case of self-executing constitutional provisions other than the contract clause is not clear.

[25] "Probably Congress had power to pass a law giving to the courts of the United States direct jurisdiction over contracts alleged to be impaired by a state law; and under the broad provisions of the Act of March 3, 1875, giving to the circuit courts jurisdiction of all cases arising under the Constitution and laws of the United States, it is possible that such jurisdiction now exists." When presented squarely with that question seven years later, the Court concluded that no such jurisdiction existed. *Hans* v. *Louisiana*, 134 U.S.1 (1890).

tional right brought with it a *pro tanto* waiver of sovereign immunity. Opposition among the states to the Fourteenth Amendment, for example, was centered less on the new powers of Congress under Section 5 than the expanded powers of the federal judiciary under Section 1. See generally, *Flack, The Adoption of the Fourteenth Amendment* (1908). The Amendment, it was said, would give the federal courts occasion to interfere in local affairs, concentrate the judicial power in the federal tribunals, enlarge federal jurisdiction to include every state law relating to life, liberty or property, and authorize the federal courts to hear every conceivable criminal and civil case, no matter how important or trivial. Id. at 150, 152, 166, 194-95. This widely expressed opposition to expanded federal jurisdiction, in the context of a constitutional amendment dealing primarily with state action, can only have been concerned with civil rights litigation which would be brought against the states themselves. See *The Civil Rights Cases,* 109 U.S. 7 (1883).

There is no reason to believe that the Congress which enacted the post-Civil War Amendments and the states which ratified them thought that actions against the states pursuant to *Cohens* would be limited to actions for injunctive relief. Historically, damages had been regarded as the ordinary remedy for invasion of individual rights. *Bivens* v. *Six Unknown Federal Narcotics Agents,* 403 U.S. 388, 397, 399 (1971). See, e.g., *Entick* v. *Carrington,* 19 Howell St., Tr. 1029 (1765). Injunctive relief, particularly affecting the conduct of government, has traditionally been regarded as "strong medicine" employed only when legal relief was inadequate. See *Perez* v. *Ledesma,* 401 U.S. 22, 111 (1971). (Brennan, J. concurring and dissenting.) The handful of cases filed against states in the Supreme Court prior to the ratification of the Eleventh Amendment were

not limited to monetary claims; *Moultrie* v. *Georgia*, for example, sought only a decree confirming the title to certain disputed land. *Jacobs, The Eleventh Amendment and Sovereign Immunity* 63-64 (1972).

The States, in ratifying the creation of new constitutional rights by the Thirteenth, Fourteenth and Fifteenth Amendments, simultaneously waived the Eleventh Amendment and the defense of sovereign immunity in any federal court empowered to hear questions arising under the Constitution of the United States. Within a few years Congress authorized the lower Federal courts to hear just such litigation, enacting in 1871 the predecessor to 42 U.S.C. §1983 and in 1875 the predecessor to 28 U.S.C. §1331. That prior consent would preclude assertion of sovereign immunity in a case under Section 1983 alleging a violation of the Fourteenth Amendment; it is no less applicable to a violation of congressional legislation implementing that Amendment. Since the instant case alleges a violation of both that Amendment and such implementing legislation, the state cannot defeat jurisdiction by claiming immunity.

E. An unwarranted expansion of the scope of sovereign immunity and the Eleventh Amendment would greatly weaken the constitutional guarantees contained in the Reconstruction Amendments.

In the preceding sections of this brief we have discussed at length reasons why the Eleventh Amendment should not be held to bar actions brought to enforce rights founded in the Thirteenth, Fourteenth, and Fifteenth Amendments. The question is not academic; it is one with which Amicus has been required to deal over a period of time in litigation brought to vindicate the rights of those the Reconstruction Amendments were intended to protect. A decision that casts doubt on the power of the federal courts to entertain such suits or to render effective relief in

them would have a devastating impact on the future of civil rights enforcement.

In the period from 1957 until 1965, an Eleventh Amendment defense to suits seeking to end unlawful racial discrimination was raised in numerous instances, occasioning the Court of Appeals for the Fifth Circuit to remark:

> "For the second time in the case and for the seventh time in recent years, we hold that a state agency is not immune from a suit to enjoin it from enforcing an unconstitutional statute. . . ." *McCoy* v. *Louisiana State Board of Education*, 345 F.2d 720, 721 (5th Cir. 1965).

See also, *School Board of Charlottesville* v. *Allen*, 240 F.2d 59 (4th Cir. 1956); *Orleans Parish School Board* v. *Bush*, 242 F.2d 156 (5th Cir. 1957); *Dorsey* v. *State Athletic Commission*, 168 F.Supp. 149 (E.D. La. 1958); *Board of Supervisors of Louisiana State U.* v. *Fleming*, 265 F.2d 736 (5th Cir. 1959); *Board of Trustees of Arkansas A.&M. College* v. *Davis*, 396 F.2d 730 (8th Cir. 1968).

The argument that private citizens could not enforce their constitutional rights in federal court because of sovereign immunity and the Eleventh Amendment seemed to have been finally laid to rest by this Court in its unanimous decision in *Griffin* v. *School Board of Prince Edward County*, 377 U.S. 218 (1964).

However, six months ago this Court issued its opinion in *Employees* v. *Department of Public Health and Welfare*, 411 U.S. 279 (1973), concerning the applicability of sovereign immunity and the Eleventh Amendment to federal legislation under the Commerce Clause. Since then state defendants have, with varying results, urged

that the rationale of *Employees* should be extended to bar enforcement against the states of the post-Civil War Amendments.

For example, the constitutionality of awards of back pay in Title VII litigation against the states has been challenged in three related cases, *Dillenberger* v. *Florida Probation and Parole Commission*, Civ. No. 73-66 (N.D. Fla., Tallahassee Div.); *Wainwright* v. *State of Florida Department of Transportation*, Civ. No. 73-42 (N.D. Fla. Mariana Div.); *Graham* v. *Marshall*, Civ. T-73-77 (N.D. Fla., Tallahassee Div.).[24] State officials have successfully urged that sovereign immunity and the Eleventh Amendment, as construed by *Employees*, protect them from even personal liability for intentionally failing to provide treatment to Negro males suffering from syphilis. *Pollard* v. *United States*, Civil Action No. 4126-N (M.D. Ala.) (Order dated September 18, 1973). In *Richardson* v. *State Board of Law Examiners*, the defendants have asserted without success that *Employees* prohibited litigation to prevent discrimination against Negro applicants for the bar (Civil Action No. 72-1219, D.S.C.).

A decision by this Court that the Eleventh Amendment bars the relief sought in the present case would therefore cast serious doubt on the constitutionality of federal courts granting analogous retrospective relief in cases under Title VII of the Civil Rights Act of 1964 as it now applies to state agencies. Moreover, it would raise questions as to the power of the federal courts to grant certain kinds of prospective injunctive relief that would have the effect of requiring the expenditure of state funds, *e.g.*, an order to

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[24] Even prior to *Employees*, at least one federal court had indicated, in *dictum*, that the Eleventh Amendment barred suit against a state agency for employment discrimination under 42 U.S.C. §§1981 and 1983. *Bennett* v. *Gravelle*, 323 F. Supp. 203 (D. Md. 1971).

hire a black job applicant who has been denied a position because of his race. Such restrictions on the power of Congress and the courts to enforce the Reconstruction Amendments would be wholly inconsistent with decisions of this Court since 1954 and can be avoided by a holding that, where a conflict is unavoidable, those Amendments restrict the reach of the Eleventh.

CONCLUSION

At the end of the eighteenth century, proponents of sovereign immunity urged its erection as a solid wall insulating the states in all cases from judicial control and enforceable civil liability. That uniform opposition by the states to being sued in state or federal courts has long since passed. At the time of *Chisholm* v. *Georgia* it was large businessmen and lenders trying to collect substantial debts who sought jurisdiction over the states. Since 1800, however, the growing political and economic influence of this class of plaintiffs has won for them, in Congress and the state legislatures, the right to litigate their claims against the states and the federal government. State agencies wishing to do business with private firms must, in general, agree to provide them with some avenue of judicial relief. The legislation establishing agencies to raise substantial sums by the sale of state notes and bonds invariably contains a provision authorizing the agency to sue and be sued. When a large firm finds its contractual arrangement with a state or the Federal government no longer profitable and the contract itself does not contain a remedy, the firm is usually able, by virtue of its unusual degree of influence over public officials, to persuade the government to waive its contractual rights or assist the firm with loans or outright

gifts. For a large bank, building contractor, or aircraft manufacturer, the defense of sovereign immunity has been effectively abolished. But a private citizen, aggrieved by state misconduct far more serious under our constitutional system, has no such political or economic power; for him sovereign immunity is still used to preclude the sort of relief readily dispensed to others.

Under these circumstances the assertions of a defense of sovereign immunity resembles, not firm adherence to some uniformly applied principle, but the selective erection of a procedural barrier to the vindication of the constitutional rights of the weak and unpopular. Whether a state has a legitimate interest in the creation of such an obstacle is a federal question of no small difficulty. See *Henry* v. *Mississippi*, 379 U.S. 443, 447-49 (1965). Certainly in a case such as this that question poses serious problems of equal protection.

For these reasons, the Amicus urges that the judgment of the Seventh Circuit Court of Appeals should be affirmed.

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